NAVAL WAR COLLEGE

INTERNATIONAL LAW SITUATIONS

WITH

SOLUTIONS AND NOTES

1907

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PREFACE.

This summary, prepared by Prof. George Grafton Wilson, of Brown University, the lecturer on international law, of the discussions of the international law situations submitted to the conference of 1907 is published for the information of the naval service.

The situations were formulated by Professor Wilson in consultation with the president and staff of the Naval War College, and were discussed by them and the officers composing the conference as fully as the time at their disposal would permit. It is the aim of the War College to direct discussion to situations that may arise with reference to which the law and precedents are not obvious or well settled, and suggestions from officers of the service are invited.

JNO. P. MERRELL,
Rear-Admiral, U. S. Navy, President.

U. S. NAVAL WAR COLLEGE,
Newport, R. I., November 25, 1907.

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International Law Situations,

WITH SOLUTIONS AND NOTES.

Situation I.

While a United States war vessel is at anchor within the area of the coaling station leased from Cuba at Guantanamo a fugitive from Cuban justice comes on board. The properly authorized Cuban officers demand that the fugitive be immediately surrendered to them.

How should the request of the Cuban officers be treated?

SOLUTION.

An alleged fugitive from Cuban justice coming on board of a war vessel of the United States within the area of the coaling station leased from Cuba at Guantanamo should under ordinary circumstances be turned over by the commander of the United States war vessel to the commandant of the station.

The subsequent treatment of the alleged fugitive, by the commandant should be governed by the terms of the lease (article 4) and by such general or special instructions as may have been issued by the United States Government.

NOTES ON SITUATION I.

General.—This Situation I is proposed in order to illustrate the complicated relationships introduced by the recent practice of transfer of jurisdiction, or the transfer of the right to exercise state authority, without the transfer of sovereignty.

Jurisdiction in general.—The jurisdiction over territory may be based on sovereignty, lease, or other ground.

The jurisdiction based on sovereignty is in general exclusive, though exceptions are sanctioned by international law and international practice. The jurisdiction based upon lease is naturally dependent upon the conditions of lease. The leases vary.

Chinese lease to Germany.—The lease of the Kiaochow region by China to Germany March 6, 1898, provides that—

> His Majesty the Emperor of China is willing that German troops should take possession of the above-mentioned territory at any time the Emperor of Germany chooses. China retains her sovereignty over this territory, and should she at any time wish to enact laws or carry out plans within the leased area she shall be at liberty to enter into negotiations with Germany with reference thereto: *Provided always*, That such laws or plans shall not be prejudicial to the German interests. Germany may engage in works for the public benefit, such as waterworks, within the territory covered by the lease without reference to China. Should China wish to march troops or to establish garrisons therein, she can only do so after negotiating with and obtaining the express permission of Germany.
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> * * * * * * *
>
> III. During the continuation of the lease China shall have no voice in the government or administration of the leased territory. It will be governed and administered during the whole term of ninety-nine years solely by Germany, so that the possibility of friction between the two powers may be reduced to the smallest magnitude. The lease covers the following districts: * * * Chinese ships of war and merchant ships and the ships of war and merchant ships of countries having treaties and in a state of amity with China shall receive equal treatment with German ships of war and merchant ships in Kiaochow Bay during the continuance of the lease. Germany is at liberty to enact any regulation she desires for the government of the territory and harbor, provided such regulations apply impartially to the ships of all nations, Germany and China included.
>
> IV. Germany shall be at liberty to erect whatever light-houses, beacons, and other aids to navigation she chooses within the territory leased and along the islands, and coasts approaching the entrance to the harbor. Vessels of China and vessels of other countries entering the harbor shall be liable to special duties for the repair and maintenance of all light-houses, beacons, and other aids to navigation which Germany may erect and establish. Chinese vessels shall be exempt from other special duties. (U. S. Foreign Relations, 1900, 384.)

Chinese lease to Russia.—In the treaty leasing Port Arthur to Russia March, 27, 1898, there were the following articles:

ART. I. It being necessary for the due protection of her navy in the waters of north China that Russia should possess a station she can defend, the Emperor of China agrees to lease to Russia Port Arthur and Talienwan, together with the adjacent seas, but on the understanding that such lease shall not prejudice China's sovereignty over this territory.

ART. IV. The control of all military forces in the territory leased by Russia and of all the naval forces in the adjacent seas, as well as of the civil officials in it, shall be vested in one high Russian official, who shall, however, be designated by some title other than governor-general (tsungtu) or governor (hsunfu). All Chinese military forces shall without exception be withdrawn from the territory, but it shall remain optional with the ordinary Chinese inhabitants to remain or to go, and no coercion shall be used toward them in this matter. Should they remain, any Chinese charged with a criminal offense shall be handed over to the nearest Chinese official to be dealt with according to Article VIII of the Russo-Chinese treaty of 1860.

ART. VI. The two nations agree that Port Arthur shall be a naval port for the sole use of Russian and Chinese men-of-war, and be considered as an unopened port so far as the naval and mercantile vessels of other nations are concerned. As regards Talienwan, one portion of the harbor shall be reserved exclusively for Russian and Chinese men-of-war, just like Port Arthur, but the remainder shall be a commercial port, freely open to the merchant vessels of all countries.

Chinese lease to Great Britain.—The provisions of the convention for the lease of Wei-hai-wei to Great Britain, July 1, 1898, are somewhat different.

The territory leased shall comprise the island of Liu Kung and all the islands in the bay of Wei-hai-wei and a belt of land ten English miles wide along the entire coast line of the bay of Wei-hai-wei. Within the above-mentioned territory leased Great Britain shall have sole jurisdiction.

It is also agreed that within the walled city of Wei-hai-wei Chinese officials shall continue to exercise jurisdiction, except so far as may be inconsistent with naval and military requirements for the defense of the territory leased.

Chinese lease to France.—A convention for the lease of Kuang Chau Wan by China to France was made on May 27, 1898, and ratified January 5, 1900.

ARTICLE I.

The Chinese Government, in consideration of its friendship for France, has given by a lease for 99 years Kuang Chau Wan to the French Government to establish there a naval station with coaling depot, but it is understood that this shall not offset the sovereign rights of China over the territory ceded.

ARTICLE III.

The territory shall be governed and administered during the 99 years of the lease by France alone, so that all possible misunderstanding between the two countries may be obviated.

The inhabitants shall continue to enjoy their property; they may continue to inhabit the leased territory and pursue their labors and occupations, under the protection of France, so long as they respect its laws and regulations. France shall pay an equitable price to the native property owners for the land which it may wish to acquire.

ARTICLE V.

Steamers of China as well as the ships of the powers having diplomatic and commercial relations with her shall be treated within the leased territory in the same manner as in the opened part of China.

France may issue all the regulations she may wish for the administration of the territory and of the ports and particularly levy light-house and tonnage dues destined to cover the expense of erecting and keeping up lights, beacons, and signals, but such regulations and dues shall be impartially used for ships of all nationalities.

ARTICLE VI.

If cases of extradition should occur, they shall be dealt with according to the provisions of existing conventions between France and China, particularly those regulating the neighboring relations between China and Tongking.

Hongkong convention.—The convention with Great Britain for the extension of the Hongkong territory signed June 9, 1898, provided as to jurisdiction that "If cases of extradition of criminals occur, they shall be dealt with in accordance with the existing treaties between Great Britain and China and the Hongkong regulations."

General character of leases.—Such provisions show differences in the terms and conditions of leases, the general

idea being that the jurisdiction in whole or in part may pass to the lessee, while the lessor retains the sovereignty. By the terms of some of these conventions leasing territories, the rights ordinarily attributed to sovereignty are passed to the lessee, as the right to construct fortifications, establish naval stations, levy taxes, etc. Such rights, however, must be specific, as otherwise the right to exercise state authority resides exclusively in the state possessing sovereignty over a given area. Chief Justice Marshall, in the Schooner Exchange *v.* M'Faddon, in 1812, stated the matter clearly.

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its own sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions.
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.
>
> This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. (7 Cranch, U. S. Supreme Court Reports, 116.)

Creation of a Servitude.—The effect of these conventions leasing territory of one state to another state for coaling stations, etc., is to create a restriction upon the exercise of territorial jurisdiction by the lessor state in favor of a lessee state. This permits within the territory of the lessor state the exercise of powers ordinarily exclusively in the state having sovereignty and thus creates a positive servitude which implies that "a state is under obligation to permit within its territory another state to exercise certain powers." (Wilson and Tucker, International Law, 146.)

Hall says of servitudes in general,

> It is usual in works on international law to enumerate a list of servitudes to which the territory of a state may be subjected. Among them are the reception of foreign garrisons in fortresses,

fishery rights in territorial waters, telegraphic and railway privileges, the use of a port by a foreign power as a coaling station, an obligation not to maintain fortifications in particular places, and other derogations of like kind from the full enforcement of sovereignty over parts of the national territory. These and such like privileges or disabilities must, however, be set up by treaty or equivalent agreement; they are the creatures not of law but of compact. The only servitudes which have a general or particular customary basis are, the above-mentioned right of innocent use of territorial seas, customary rights over forests, pastures, and waters for the benefit of persons living near a frontier, which seem to exist in some places, and possibly a right to military passage through a foreign state to outlying territory. In their legal aspects there is only one point upon which international servitudes call for notice. They conform to the universal rule applicable to "jura in re aliena." Whether they be customary or contractual in their origin, they must be construed strictly. If, therefore, a dispute occurs between a territorial sovereign and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it the burden lies of proving its claim beyond doubt or question. (International Law, 5th ed., p. 159.)

State Department opinion of Chinese leases.—A memorandum for the office of the Solicitor of the Department of State by Mr. Van Dyne on January 27, 1900, summarizes the Chinese leases.

By the leases made by the Chinese Government of Weihaiwei, Kiaochow, and Port Arthur to Great Britain, Germany, and Russia, respectively, the *jurisdiction* of China over the territories leased is relinquished during the terms of the leases. In the case of Weihaiwei, leased to Great Britain, it is expressly provided that "within the territory leased Great Britain shall have *sole* jurisdiction."

In the lease of Kiaochow to Germany, it is provided that China shall have no voice in the government or administration of the leased territory, but that *it shall be governed and administered during the whole term of the lease by Germany;* that Germany is at liberty to enact any regulation she desires for the government of the territory. Chinese subjects are allowed to live in the territory leased, under the protection of the German authorities, and there carry on their business as long as they conduct themselves as law-abiding citizens. Provision is made for the surrender to the Chinese authorities of fugitive Chinese criminals taking refuge in the leased territory. The Chinese authorities are not at liberty

to send agents into the leased territory to make arrests. The lease declares that China "*retains her sovereignty over this territory.*"

In the lease of Port Arthur to Russia it is provided that the control of all military forces, as well as the *civil officials* in the territory, shall be vested in one high Russian official; that all Chinese military forces shall be withdrawn; that the Chinese inhabitants may remain or go, as they choose; that if they remain, any Chinese charged with a criminal offense shall be handed over to the nearest Chinese official to be dealt with. [Mr. Conger says that the Russian legation informs him that this last provision is not correctly translated, and that, construing it in connection with article 8 of the treaty of 1860, the Russian Government has the right and does try Chinese for crimes committed against Russians.] This lease is expressly declared on the understanding that it "*shall not prejudice China's sovereignty over this territory.*"

As it is expressly stipulated in the leases that China retains *sovereignty* over the territory leased, it could doubtless be asserted that such territory is still *Chinese territory* and that the provisions of our treaties with China granting consular jurisdiction are still applicable therein. But, in view of the express relinquishment of jurisdiction by China, I infer that the reservation of the sovereignty is merely intended to cut off possible future claims of the lessees that the sovereignty of the territory is *permanently* vested in them. The intention and the effect of these leases appear to me to have been the relinquishment by China, *during the term of the leases*, and the conferring upon the foreign power in each case *of all jurisdiction over the territory.* (U. S. Foreign Relations, 1900, 388.)

Practice under Chinese leases.—This summary of the nature of jurisdiction in the areas held under lease from China shows a considerable difference in extent of jurisdiction. Since these leases were negotiated practice has shown that Chinese authority was for the most part at an end within the leased areas. The states holding the leases have not established uniform regulations for the government of the leased territories. There have been frequent conflicts and differences of opinion on the subject of the exercise of jurisdiction. The general result has been favorable to the exercise of full power in the leased territory by the lessee as against third states. The principle upon which decisions have been made is that the grant of a specific right carries with it the privilege

of such action as is necessary for the exercise of the right. Wherever definite reservations or agreements occur in the treaty or convention granting the lease, such reservations or agreements are considered to have full force and validity as against any general grant.

United States and territory relinquished or ceded by Spain in 1898.—By Article I of the treaty of December 10, 1898, between the United States and Spain (30 U. S. Statutes at Large, 1754) as a result of the Spanish-American war, it is provided:

ARTICLE I. Spain relinquishes all claim of sovereignty over and title to Cuba; and as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation for the protection of life and property.

It is to be observed that by this promise Spain merely "relinquishes all claim of sovereignty over and title to Cuba." The following article goes further than merely to relinquish sovereignty:

ARTICLE II. Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies and the island of Guam in the Marianas or Ladrones.

While sovereignty and title to Cuba was relinquished, Spain's claim to the other islands mentioned in the second article was ceded to the United States. The status of the areas mentioned in the two articles would therefore be unlike. Porto Rico and the other islands mentioned in the second article would come immediately under the sovereignty of the United States. That the act of Spain is unlike in character in the two instances is fully recognized in the subsequent articles of the treaty which uniformly refer to "the sovereignty relinquished or ceded" "as the case may be."

By a later article of the treaty it is provided:

ARTICLE XI. The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject in matters civil as well as matters criminal to the jurisdiction of the courts of the country wherein they reside, pur-

suant to the ordinary laws governing the same; and they shall have a right to appear before such courts and to pursue the same course as citizens of the country to which the courts belong.

This right of the Spaniards to be subject "to the jurisdiction of the courts of the country wherein they reside" would be a right which would generally extend to citizens of other states under the "most favored nation treatment."

Further, in accordance with Article XVI:

It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will, upon the termination of such occupancy, advise any government established in the island to assume the same obligations.

The implication of this article is that a responsible government would be established in Cuba and that this government would be advised to assume the same obligations in regard to the civil and criminal jurisdiction which the United States had assumed.

Coaling and naval stations in Cuba.—The so-called "Platt amendment" of March 2, 1901, provided:

That in fulfillment of the declaration contained in the joint resolution approved April twentieth, eighteen hundred and ninety-eight, entitled "For the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect," the President is hereby authorized to "leave the government and control of the island of Cuba to its people" so soon as a government shall have been established in said island under a constitution which, either as a part thereof or in an ordinance appended thereto, shall define the future relations of the United States with Cuba, substantially as follows:

Among the promises defining the relations of the United States with Cuba the seventh is as follows:

That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain

specified points, to be agreed upon with the President of the United States. (31 U. S. Statutes at Large, 895.)

The articles of this amendment became an appendix to the constitution of Cuba promulgated on the 20th of May, 1902. By an agreement between the United States and Cuba, February 16–23, 1903, the Republic of Cuba leased certain areas in Guantanamo and in northern Cuba to the United States for the purposes of coaling and naval stations. In regard to Article I of this agreement, which defines the areas leased, the second and third articles of the agreement say:

ARTICLE II.

The grant of the foregoing article shall include the right to use and occupy the waters adjacent to said areas of land and water, and to improve and deepen the entrances thereto and the anchorages therein, and generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose.

Vessels engaged in the Cuban trade shall have free passage through the waters included within this grant.

ARTICLE III.

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above-described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas, with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain, with full compensation to the owners thereof.

These areas, commonly called Guantanamo and Bahia Honda, are therefore *leased* to the United States and not *ceded*. The United States, therefore, has only a qualified jurisdiction over these regions and not sovereignty, as in Porto Rico and the Philippines, and the conditions of exercise of jurisdiction in these leased areas are accordingly unlike the conditions within the areas over which the United States exercises sovereignty.

The exercise of jurisdiction in leased areas varies according to the provisions of the lease.

Fugitive criminals in leased area.—The agreement of July 2, 1903, leased certain areas in Guantanamo and in Bahia Honda in Cuba to the United States for naval or coaling stations. Article IV of this lease provided that "Fugitives from justice charged with crimes or misdemeanors amenable to Cuban law, taking refuge within said areas, shall be delivered up by the United States authorities on demand by duly authorized Cuban authorities."

Under this article of the lease a fugitive from Cuban justice taking refuge within the leased area should be delivered to the duly authorized Cuban authorities. The agreement upon the areas made February 16–23, 1903, distinctly specifies that the lease covers the described areas of land and water. Therefore under ordinary circumstances a fugitive from Cuban justice entering the leased areas would be surrendered.

By Article I of the agreement of February 16–23, 1903, "the following described areas of land and water" are leased to the United States by Cuba. The terms of the agreement specify that the lease covers certain adjacent waters within definite limits and carries also "the right to use and occupy the waters adjacent to said areas of land and water." The United States obtained complete jurisdiction over certain waters and qualified rights in adjacent waters.

Within the area outside either of the above-mentioned waters the ordinary course in regard to fugitives from justice would be followed. The waters adjacent to the waters over which the United States is granted complete jurisdiction are subject to the use of the United States "generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose." The ordinary course in regard to the fugitives from justice would therefore be followed there.

The terms of this lease proclaim, as in the cases of the Chinese leases, that it is jurisdiction and not sovereignty that is passed by the lease. The conditions of the lease of

Cuban territory to the United States do not fix a limit of a period of time, as in the Chinese leases, but the United States agrees to pay a fixed sum per year so long as it shall occupy and use the leased area. Further, the United States undertakes as part equivalent for this lease "to maintain the independence of Cuba and to protect the people thereof." Thus the United States assumes an additional obligation over and above the obligations usually assumed in the Far East.

The status of the leased areas therefore needs definition.

The question next raised would naturally be whether a war vessel of the United States under international law and under the terms of the treaties with Cuba should surrender a fugitive from Cuban justice.

Jurisdiction over vessels in leased area.—The jurisdiction over a given vessel will depend upon the character of the vessel and upon its relation to the sovereign and to the other parties concerned. If it is a private merchant vessel of a third state not party to the lease, its relations may be unlike those of a similar vessel of the parties to the lease. The relations of public vessels would be unlike those of private vessels.

The regulations for the government of the Navy of the United States, 1905, article 308, state that "The right of asylum for political or other refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, usage sanctions the granting of asylum; but even in the waters of such countries officers should refuse all aplications for asylum except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum." According to this regulation asylum should not be granted to a refugee under other than exceptional circumstances.

Within both land and water areas leased to the United States fugitives from Cuban justice would under Article

IV "be delivered up by the United States authorities on demand by duly authorized Cuban authorities."

Granting that the fugitive escapes to a war vessel of the United States while the vessel is within the area which is under the complete jurisdiction of the United States, would the provisions of the treaty apply to the war vessel and should the commander "deliver up" the fugitive under the terms of the treaty? Of course, Cuba could make a law by which a political offense might be a crime or misdemeanor. Should the commander when within the leased area deliver up a political refugee whom he might retain under other circumstances?

By Article VI of the Constitution of the United States, "This Constitution and the Laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made, under the authority of the United States, shall be the supreme Law of the Land."

An agreement of the nature of this lease would become in effect law and would bind all officials within the area. Further, the agreement was made with the specific purpose of prescribing a method by which fugitives from Cuban justice escaping into the area within the military control of the United States should be recovered by the proper Cuban authorities.

To set up a claim that a war vessel of the United States would be exempt from an agreement made with special reference to the establishment of a naval base and the control of its area would be inconsistent with a reasonable interpretation of the terms of the agreement.

Reciprocal obligations.—There is also a reciprocal agreement which, in addition to prescribing that fugitives from Cuban justice "shall be delivered up by the United States authorities," provides that—

> On the other hand, the Republic of Cuba agrees that fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within said areas, taking refuge in Cuban territory, shall, on demand, be delivered up to duly authorized United States authorities.

Competence of commandant of naval station.—There may sometimes be doubt as to the identity of the criminal,

the proper method of procedure, the extent of the authority of the Cuban official, the nature of the crime, or other matters with which the commander of a war vessel could hardly be expected to be familiar.

The commandant of the naval station would naturally be familiar with such matters because acting under an agreement relating thereto. It would seem safest and in the end a proceeding little open to question to turn a fugitive from Cuban justice escaping to a war vessel within the leased area at Guantanamo over to the commandant of the naval station.

The commandant would be bound to turn the fugitive from justice over to the duly authorized Cuban authorities. Of course, the commandant would be under obligation to satisfy himself of the identity of the criminal, of the proper authorization of the officials demanding that the fugitive be surrendered, and of such other facts as would secure the fulfillment of Article IV of the lease of 1903.

As the attitude of the United States is in general unfavorable to the harboring of fugitives from justice on board war vessels, as the practical inconveniences of having such a person on board a war vessel are considerable, and as Article IV of the lease provides for the giving up of fugitives within the leased areas "on demand by the proper Cuban authorities," it would seem proper to regard a war vessel of the United States as subject to the terms of the lease and as being of the nature of a floating naval station for the time being within the leased area and under provisions of the lease.

Conclusion.—An alleged fugitive from Cuban justice coming on board a war vessel of the United States within the naval coaling station at Guantanamo leased from Cuba should under ordinary circumstances be turned over by the commander of the United States war vessel to the commandant of the naval station.

The subsequent treatment of the alleged fugitive by the commandant should be governed by Article IV of the lease and by such general or special instructions as may have been issued by the United States Government.

Situation II.

A United States auxiliary collier commanded by an officer appointed by the Secretary of the Navy is in a harbor of State X. The collier collides with and injures a foreign vessel. The owner of the foreign vessel brings suit against the commander of the collier for damages under the civil law, claiming that the status of the collier is uncertain, and that the commander would in any case be liable as would the commander of a ship of StateX, the commanders of whose vessels, public and private, are liable in the civil courts of that state under similar circumstances.

What position should the senior officer of the United States take?

SOLUTION.

The senior officer, acting in accordance with principle, precedent, and regulations, should appoint a board of inquiry and maintain that the suit should not be brought against the master of the auxiliary collier, but that the claims should be referred to the United States Government through diplomatic channels.

NOTES ON SITUATION II.

General.—In this situation the owner of the injured foreign vessel claims that the status of a United States auxiliary collier is uncertain. He also claims that even if the collier was recognized as a public vessel it would be liable to the same treatment as domestic public vessels under similar circumstances and that the collier could therefore be made the defendant *in rem* or its commander the defendant *in personam* in a suit for damages resulting from a collision.

Claims against public vessels and property in foreign ports have been made in various forms. These claims

have involved property rights, salvage and other service, collisions, and in general such matters as could properly be subject to national court jurisdiction.

Property rights against a foreign war vessel.—In 1812 Chief Justice Marshall delivered the opinion in the celebrated case of the Schooner Exchange *v.* M'Faddon. This case involved the very delicate and important inquiry, whether an American citizen can assert, in an American court, property rights against a foreign national vessel. The learned Chief Justice laid down the fundamental principle—

> The jurisdiction of the courts is a branch of that possessed by the nation as an independent sovereign power.
>
> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restrictions upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.
>
> The consent may be either express or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction, but, if understood, not less obligatory.
>
> The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

After a full discussion of various forms of immunity, the decision continues:

> It seems, then, to the court to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.
>
> Without doubt the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force or by subjecting such vessels to the or-

dinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual, whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction.

The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic rather than legal discussion, are of great weight, and merit serious attention. (7 Cranch, U. S. Supreme Court Reports, 116.)

Salvage and foreign war vessels.—Sir William Scott, in 1820, in a suit for salvage against the *Prins Frederik*, said:

I think that the first application for a recompense in the nature of salvage, ought, in the case of a ship of war belonging to a foreign state, to have been made to the representative of that state resident in this country. In the present case no doubt can be entertained that just attention would have been paid to the application, and due care taken, after proper information obtained, to have answered the claim in some form or other, as substantial justice might seem to require; for it is not reasonable to suppose that private individuals in this country should go unrewarded for services rendered to ships of foreign governments when they would have been liberally rewarded for similar services performed for such ships belonging to their own. (2 Dodson's Admiralty Reports, 451, 484.)

In the case of the United States frigate *Constitution*, carrying machinery, etc., from the Paris Exposition, stranded on Ballard Point, England, in 1879, and against which suit was brought for salvage by owner of steam tug which pulled *Constitution* off, Sir Robert Phillimore said:

There is no doubt as to the general proposition that ships of war belonging to a nation with whom this country is at peace

are exempt from the civil jurisdiction of this country. I have listened in vain for any peculiar circumstances to take this case out of that general proposition. It has happened to me more than once, since I have had the honour of sitting in this chair, to have been requested by foreign states to sit as arbitrator and to make an award in cases—one of collision and two of salvage. If a similar request had been made to the court in this case, I would gladly have undertaken the duty sought to be imposed upon it; but I have now only to consider whether there is any authority for the proposition that when a foreign state refuses to waive the privilege which it possesses it is competent to this court, nevertheless, to treat it as an individual and serve civil process on its property. I am clearly of the opinion that it would be very wrong and improper in me to assent to this application on the part of the owner of the steam tug. (4 Law Reports, Probate Division, 39.)

This decision denies the right of a British citizen to compel payment by a public vessel for services rendered when the vessel was in great need.

Military supplies belonging to a foreign sovereign.—In the case of Vavasseur *v.* Krupp the question of jurisdiction over the property of a foreign sovereign was raised. The foreign sovereign involved was the Emperor of Japan. The case was brought in England and is summarized as follows:

A foreign sovereign bought in *Germany* shells made there, but said to be infringements of an English patent. They were brought to this country in order to be put on board a ship of war belonging to the foreign sovereign, and the patentee obtained an injunction against the agents of the foreign sovereign and the persons in whose custody the shells were, restraining them from removing the shells. The foreign sovereign then applied to be and was made a defendant to the suit. An order was then made up by the master of the rolls, and approved on appeal, that notwithstanding the injunction he should be at liberty to remove the shells.

In 1877 the British court gave the opinion that property of a foreign sovereign in Great Britain could not be held, saying of the Chancery Division of the High Court of Justice—

This court has no jurisdiction, and, in my opinion, none of the courts in this country have any jurisdiction, to interfere with the property of a foreign sovereign, more especially with what we call the public property of the state of which he is soverign as distin-

guished from that which may be his own private property. The courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented, as all foreign countries having a sovereign are represented, by the individual who is the sovereign. (Law Reports, 9 Chancery Division, 351.)

Domestic regulations as to foreign war vessels in time of peace.—The attempt to regulate in some detail the entrance and sojourn of foreign public vessels has been made by several states. States having large navies have not generally made many regulations. Public vessels are required to respect police, quarantine, sanitary, fiscal, and harbor regulations.

Article 11 of the Netherlands royal decree of February 2, 1893, provided—

that foreign ships and vessels of war shall respect the existing police, sanitary, and fiscal laws and regulations, and shall further submit to all rules and regulations of the port, in both cases to the same extent as is demanded of the national ships and vessels of war. (2 Moore, International Law Digest, 593.)

Regulations somewhat similar in scope are in force in other states.

In the second volume of Professor Moore's monumental and most valuable work, "A Digest of International Law," there appears a letter from the Secretary of State to the Secretary of the Navy in regard to the attitude of the United States toward such regulations as above mentioned:

I have the honor to acknowledge the receipt of the letter from your Department, dated the 9th of August last, inclosing for an expression of this Department's views in the matter a copy of a letter from the Chief of the Bureau of Navigation of the Navy Department, with inclosures, relative to the propriety and feasibility of issuing an order to naval vessels directing that when pilots are not employed local foreign laws requiring the employment of pilots are not to be held to compel the payment of pilotage by public vessels.

In reply I have the honor to say that the laws of some of our States require the payment of pilotage fees when pilots are not employed, and these laws, by their terms, apply to all vessels.

The doctrine of international law is that all vessels are subject to the revenue and police regulations, including those in regard to pilotage, of the territorial waters which such vessels may enter. In the statement of the doctrine no exception is made in favor of public vessels.

In Secretary Chandler's letter of July 12, 1884, inclosed in yours, the statement is made that certain exemptions are allowed by international law to public vessels; and in Secretary Frelinghuysens letter, also inclosed with yours, the same statement is made. No authorities are cited in support of the proposition, while the doctrine above mentioned is stated in Lawrence, International Law, pages 223 and 226; Hall, International Law, page 192; Pradier-Fodéré, International Law, section 2379.

The latter says that "the ports, the roadsteads, the harbors form a dependency of the national public domain, and the ships of foreign nations are under the obligation to observe rigorously the general and special regulations in force in the harbors, roadsteads, and ports."

In view of the foregoing the Department could not advise the adoption of the rule suggested. (Page 583.)

Regulations in regard to the sojourn in time of peace of war vessels of a foreign power within the territorial waters of a given state may be and have been made. The regulations most frequently have regard to police and quarantine.

A royal decree of February 18, 1901, regulates in considerable detail the admission of foreign men-of-war to the harbors of Belgium.

Leopold II, King of the Belgians, to all present and to come, greetings:

Considering that the time is opportune to regulate, in conformity with international law and the obligations of perpetual neutrality, the admission of foreign men-of-war in the waters and harbors of Belgium;

On the proposition of our Ministers of Foreign Affairs, of War, and of Railways, Posts, and Telegraphs,

We have ordered and order:

GENERAL DISPOSITIONS IN TIME OF PEACE.

ARTICLE I. In time of peace war vessels belonging to foreign powers may enter freely Belgian harbors of the North Sea and anchor off said waters within territorial waters, provided that

the number of such vessels flying the same flag, including those already within that zone or in harbor, does not exceed three.

ARTICLE II. Foreign men-of-war may not enter the Belgian waters of the Scheldt, anchor in the roads of Antwerp, nor penetrate within the inland waters of the Kingdom without first obtaining the authorization of the minister of foreign affairs.

This authorization shall be asked through the medium of the subinspector of Belgian pilotage at Flushing.

ARTICLE III. Foreign men-of-war, unless especially authorized by the Government, may not remain longer than two weeks in the Belgian territorial waters and harbors.

They are required to put to sea within six hours when requested to do so by the navy administration or the territorial military authorities, even should the time fixed for their stay not have expired.

ARTICLE IV. Should peculiar circumstances demand it, the Government reserves the right to modify the above restrictions to the entrance or stay of foreign men-of-war in Belgian waters and harbors.

ARTICLE V. The dispositions of Articles I, II, and III do not apply to men-of-war whose admission has been authorized through diplomatic channels, nor to vessels on board of which happen to be either a chief of state, a prince of a reigning dynasty, or a diplomatic agent accredited near the King or Government.

ARTICLE VI. Foreign men-of-war in Belgian waters are prohibited from making sketches or taking soundings, as well as from engaging in landing or firing exercises.

Members of the crew should be without arms when on shore. Commissioned and noncommissioned officers may carry the arms which form a part of their uniforms.

Boats plying in the harbors and territorial waters must not be armed.

Should funeral honors be given on shore, an exemption to paragraph 2 of the present article may be authorized by the minister of war on request of the territorial military authorities.

ARTICLE VII. Captains of foreign men-of-war are required to observe the laws and regulations concerning the police, public health, taxes, and imposts, unless exceptions be established by particular convention or by international usages.

Status of public vessels other than war vessels.—From the decisions and regulations it would seem to be established that a public vessel of war would not be liable to the jurisdiction of a local court.

There are, however, many vessels engaged in such service as may give rise to questions in regard to exemption.

These vessels may be engaged in transport, mail, telegraph, collier, or other service for the government of a state and under state control.

Opinions upon the status of such vessels have gradually become more clearly defined.

Status of a troopship.—In March, 1842, the *Athol*, a British troopship, ran down and sunk the British Shipping Company's brig *Jane Clark*. Application was made to recover for the loss.

Doctor Lushington gives his opinion in the case:

> Now the first consideration which occurs is this, viz: How far could I enforce the execution of the process if it should be granted and resisted? This is an important point to be considered, in the first instance, in all cases of this kind, inasmuch as it would, I conceive, be a very imprudent and scarcely a befitting attempt in any court to issue a process which it could not enforce, and which, if resisted, must terminate in a defeat of the authority of the court. In applying this consideration to the present case the following difficulties suggest themselves as conclusive of the question which I am now called upon to determine: In the first place, I feel that I could not enforce the monition if the lords of the Admiralty should refuse to appear; and secondly, assuming that an appearance should be given on their behalf, and it should be found that the damage in question was occasioned by the fault of the troopship, the *Athol*, or those on board her, I could not enforce the payment of that damage as against the lords of the Admiralty under the circumstances of this case. But there are also other considerations which induce me to refuse this application. As far as my own experience extends in the practice of this court, I am not aware of any case in which a similar process has been issued; on the contrary, in a case which was decided by Lord Stowell, and which is the only case that I can recollect in any degree approaching to the circumstances of this case, Lord Stowell expressly refused to issue any monition upon the ground that "he was satisfied that the lords commissioners of the Admiralty would be disposed to do justice upon being convinced that wrong had been done, and that the occurrence complained of had actually taken place." (1 Robinson's Admiralty Reports, 374.)

Status of a public mail vessel.—The *Parlement Belge*, a vessel belonging to the King of the Belgians, unarmed and carrying mails, collided with a private British vessel, the *Daring*. In the Court of Appeal in 1880 it was held, reversing the decision of the Admiralty Division:

As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.

In the same case it was also held—

that an unarmed packet belonging to the sovereign of a foreign state, and in the hands of officers commissioned by him, and employed in carrying mails, is not liable to be seized in a suit *in rem* to recover redress for a collision, and this immunity is not lost by reason of the packet's also carrying merchandise and passengers for hire. (5 Law Reports, Probate Division, 197.)

Liability for pilotage.—In the case of Symons *v.* Baker (K. B. Div., Aug. 4, 1905), the *Kharki*, a coal vessel owned by His Majesty's Government, was involved. The *Kharki* was a "collier exclusively engaged in going backwards and forwards to various ports, carrying coal for the navy." She flew the Devonport Dockyard flag, but not the navy flag. She appears in the Navy List under the heading, "List of small steam vessels, tugs, etc., employed on harbor service." Her master held a board of trade certificate issued by the dockyard authorities at Devonport and acted on instructions received from the coaling officer at Devonport Dockyard. "He is not an officer of the royal navy. The crew of the vessel were engaged at the dockyard under articles of agreement." It was claimed that the master of such a vessel was liable to pilotage dues and that the vessel was used for "commercial purposes."

Lord Chief Justice Alverstone, in granting an appeal, said of the claim that the *Kharki* was used for "commercial purposes."

I think there was nothing commercial about this. I think the facts show, and the learned magistrate does not differ from that, that the *Kharki* was being employed as what may be called a coal tender, and solely as a tender taking coal to the ships of the navy.

Therefore, unless some distinction can be drawn between one of His Majesty's ships performing a more dignified service and one which was performing, as this vessel was, a most useful but less dignified service, I do not understand the distinction of "commercial purposes."

Now the vessel in question is clearly a King's ship; that is to say, she comes within the words of section 741 of the Merchant Shipping Act, which are, "shall not, except as expressly provided, apply to ships belonging to His Majesty." Of the claim that the master of the *Kharki* would be liable because he ordered the pilotage, it was said, "He [the master] is the master of the King's ship; he acts as master in behalf of the Crown; he is an agent in the ordinary sense of the word." The remedy would be by petition of right for the amount of claim. Neither ship or master could be proceeded against. (X, Asp. Mar. Law, Cas. 129.)

Collision of public and private vessels of different States.—In 1883 the Mexican gunboat *Independencia* ran down the American schooner *Daylight*. A dispatch from Mr. Frelinghuysen, Secretary of State, to Mr. Morgan, minister to Mexico, shows the attitude of the United States at that period:

Mr. Frelinghuysen to Mr. Morgan.

DEPARTMENT OF STATE,
Washington, November 15, 1883.

SIR: Your dispatch, No. 690, of the 21st September, in relation to the claim of Capt. Fred. L. Blair, of the American schooner *Daylight*, has been received.

The note of the 18th of September addressed to you by Mr. Fernandez, a copy of which accompanies your dispatch, has been carefully considered. I regret to find that the inquiry made in my instruction of the 24th of March last (No. 382), and which it is perceived you submitted to Mr. Fernandez, has not, as I conceive, been explicitly answered by the Mexican Government. If liability to the party injured attaches as a result of the *Independencia's* action in running down the American schooner, such liability is imputable, not to the commander of the gunboat, but to the Mexican Government. If Mr. Fernandez is to be understood as saying that an American citizen may, in such a case, maintain legal proceedings for the recovery of the damages thus claimed directly against the Government of Mexico in the courts of that Republic,

I have only to observe that I have not heretofore understood that, under the laws of Mexico, the Government of that country might be sued in its own courts either by a citizen of the Republic or a foreigner, without special permission having first been given for that purpose, and before I could consent to submit the claimant in the present case to the expense and delay of such a proceeding it is desirable that I should be exactly informed on that point.

In Mr. Mariscal's note to you of the 3d of March last, that minister, amongst other observations in regard to the claim, says, "If Captain Blair considered that the Mexican Government is responsible for the disaster which his vessel suffered, he should apply directly to the department of war and marine, under whose jurisdiction the *Independencia* is. If that department admits the responsibility of the Government in the matter, all difficulties will at once disappear," and the same sentiment is reiterated by Mr. Fernandez in his note to you of the 15th ultimo. With reference to these suggestions I have only to remark that the claim in question is presented by the Government in behalf of its injured citizen through the ordinary and only recognized channels of communication between it and that of Mexico, and if by the laws or administrative regulations of that Republic it is made essential that the facts should be first investigated by the ministry of war and marine, it is conceived that the subject should be referred to that department by the minister of foreign affairs. Such would be the course pursued by this Government were a similar demand to be made upon it by that of Mexico. You will at as early a day as may be convenient bring these suggestions to the attention of the Mexican minister of foreign affairs, and you will say at the same time that, upon a careful examination of the facts, this Department reached the conclusion that the Mexican Government was properly responsible for the damages resulting from the disaster in question, and that the hope is entertained that the minister will see the propriety and equity of an early adjustment of the claim.

I am, etc., FRED'K T. FRELINGHUYSEN.

(U. S. Foreign Relations, 1884, p. 343.)

On February 21, 1885, the schooner *Lanie Cobb*, of Bangor, Maine, while in the harbor of La Guayra, was run down by the *Ana Eulogia*, a vessel under commission of the Venezuelan Government. Secretary Bayard, writing to the United States representative in Venezuela after it had been found difficult to obtain any redress for damages, said:

At the time of the accident the *Ana Eulogia* was under commission of the Venezuelan Government, and that Government by

every reasoning is responsible for the damage to the *Lanie Cobb* on account of the careless and inexcusable acts of those on board the former vessel. While, as previously stated, President Crespo's ownership ought not to have any effect in aggravating damages, yet his high office places him in a position in which he must be personally cognizant of the injury done and peculiarly sensitive as to its redress. (U. S. Foreign Relations, 1885, p. 925.)

An act of Congress provided in the case of the steamship *Foscolia*, which was in collision with the United States steamer *Columbia:*

That the claim of the owners of the British steamship Foscolia, sunk by collision with the United States steamship Columbia on the evening of May twenty-eight, eighteen hundred and ninety-eight, near Fire Island light-ship, for and on account of the loss of said vessel and cargo, may be submitted to the United States district court for the southern district of New York, under and in compliance with the rules of said court sitting as a court of admiralty; and said court shall have jurisdiction to hear and determine and to render judgment thereupon: *Provided, however*, That the investigation of said claim shall be made upon the following basis: First, the said court shall find the facts attending the loss of the said steamship Foscolia and her cargo; and, second, if it shall appear that the responsibility therefor rests with the United States steamship Columbia, the court shall then ascertain and determine the amounts which should be paid to the owners, respectively, of the Foscolia and her cargo, in order to reimburse them for the losses so sustained, and shall render a decree accordingly: *Provided further*, That the amounts of the losses sustained by the master, officers, and crew of the Foscolia may be included in such decree.

That should such decree be rendered in favor of the owners of the Foscolia and her cargo, the amount thereof may be paid out of any money in the Treasury not otherwise appropriated. (United States Statutes at Large, 57th Congress, 1901–1903, Vol. 32, part 1, p. 242.)

The case of the *Foscolia* is stated as follows:

On the 28th of May, 1898, about 7.45 o'clock, p. m., a collision occurred, in a fog, about 12 miles southerly and westerly from Fire Island light-ship, between the U. S. cruiser *Columbia* and the British steamship *Foscolia*, a freighter owned by the libellants, which resulted in the total loss of the latter, with all of the cargo on board and the greater part of the stores and of the personal effects of the crew. (123 Federal Reporter, 105.)

Claims were made to recover $226,889.36.

The United States admitted that the *Columbia* did not show lights and was sounding no fog signals on account of the existence of a state of war.

The court decided that under the act of Congress the *Foscolia* was entitled to damages, even though the commander of the *Columbia* might be acting under orders.

In this case the libellants took action to ascertain the amount of damages only by authority of an act of Congress.

Collision between United States naval auxiliary collier and vessel in foreign harbor.—The Hongkong Daily Press of July 5, 1906, gives a summary of the case of the U. S. N. collier *Alexander:*

That case was one of *in personam* against Captain Gove, of the U. S. S. *Alexander*, claiming from him personal damages for the loss alleged to have been sustained by the collision alleged to have occurred between the *Alexander* and the plaintiff's junk in the waters of the harbor. The first consideration for his lordship was, the *Alexander* was a public armed vessel, the property of a friendly nation, the United States of America. This ship at the time the collision was said to have occurred was in the waters of the colony on the implied invitation of the sovereign of the British Empire. That implied invitation carried with it the undertaking that a public armed vessel of the United States was free from the jurisdiction of that court so long as she demeaned herself in a friendly way within the jurisdiction. He took it that it would not be denied by his learned friend that as such an armed ship was free from all suits in the colony. It was necessary to establish that proposition because he wished to argue that the exemption afforded to the ship covered her as a unity, as an entity, covered her not merely as so much steel, but in her capacity as a public armed ship. One of the reasons for the immunity of a public armed ship, part of the military and naval force of a friendly nation, was so as not to interfere with her efficiency. As far as the hull went, it was free from arrest, and his learned friend, being well aware of that, did not go to the court for a warrant for the ship's arrest. The assumption was that the United States was willing to do justice to foreigners as well as to her own subjects, and the remedy for any person who suffered from collision with one of her ships was through the proper diplomatic channels. The immunity of a public armed ship was not confined to her hull only, it extended to her machinery, her guns (which were not a part of the ship), and to her captain and crew. Take the captain and the crew out of the

ship and she was reduced to the character of United States property, but she was no longer an armed ship, part of the military and naval force, which that power had sent into Asiatic waters. Take the guns out of her and the same remark applies, though, the *Alexander*, being a collier, she would be less efficient without her crew than without her guns. Taking her crew out of her would render her inefficient to perform the services required of her. How could they contend that that which would render her still less efficient could be taken from her, could be made liable to this jurisdiction? We have in this colony a law, which was repealed in England in 1861, which allows imprisonment for debt of the person of the debtor. A judgment against the captain renders him liable to be imprisoned if he could not find the money; the plaintiffs had the right to imprison the debtor.

The CHIEF JUSTICE. Your proposition is not confined to Hongkong?

The ATTORNEY-GENERAL. Obviously not.

Proceeding, he said that the general principle was that they must do nothing to interfere with the efficiency of the ship or the purpose for which she was sent to those waters by a foreign sovereign. Captain Gove had come here from Shanghai out of respect for the jurisdiction of this court and the ship had gone to sea without a captain. That was a serious interference with the domestic economy of the ship, an interference with her efficiency. His lordship had before him an affidavit from the officer in command of the station to the effect that he had received telegraphic orders that Captain Gove was to rejoin his ship as soon as he could get away. The captain of the *Alexander* could not be used as if he were the captain of an American merchant ship.

The CHIEF JUSTICE. Does the question of extraterritoriality come into it? Actions may be brought against foreign governments.

The ATTORNEY-GENERAL. If they submit.

Mr. Slade argued that a foreign man-of-war was in the same position as a British man-of-war. Supposing a ship of war engaged on important state duty ran down any vessel, if the officer in charge of her set foot on shore he might be served with a writ and become immediately subject to the jurisdiction of that court. It was suggested in that case that Captain Gove was acting in the course of his duty as captain of the vessel that ran down the junk. Their allegation was that he was not acting properly in command, that he was not doing his duty as a servant of his state. They alleged that he had been guilty of neglect. If they admitted there was neglect the plaintiffs had no case. They said the captain was not doing his duty as he ought to have done. Therefore the commands of his sovereign could not avail

him. His orders were to proceed with all due and proper care from the side of the U. S. S. *Baltimore*, then anchored at Kowloon Bay. He in fact disobeyed these orders, and by his negligence injures the plaintiffs.

The attorney-general said there was no allegation of neglect in the writ.

Mr. Slade said the writ was in the usual form. Continuing, he said that when an action was brought against a British warship and judgment given, the damages were recovered from the captain personally, and he submitted that the captain of a foreign warship could not be in a better position than the captain of a British warship.

The attorney-general pointed out that the difference between the captain of a British warship and the captain of a foreign warship was that the former was always within the jurisdiction of the British courts. The King's writs ran in all the King's ships.

The Chief Justice reserved his judgment.

The above-mentioned case was brought to the supreme court, Admiralty jurisdiction, Hongkong, China, against Captain Gove, who commanded the U. S. naval auxiliary *Alexander*. The *Alexander* had coaled the U. S. S. *Baltimore*, and " when leaving the latter's side to proceed to her anchorage " collided with the junk, *Tung On Tai*. A naval board of inquiry placed the blame on the junk. The owners of the junk brought suit under the civil law against the master of the *Alexander*. On request the governor of Hongkong directed the Crown lawyers to conduct the case in behalf of the United States. The judgment in this case involves several conclusions of sufficient importance to warrant reproduction in full, particularly as such decisions are not under ordinary circumstances easily accessible.

The chief justice, Sir Francis Piggott, said:

In this case the attorney-general moved on behalf of the Crown at the instance of the Government of the United States to dismiss an action brought in the Admiralty jurisdiction of this court by the owners of the junk *Tung On Tai* and the owners of her cargo against Arthur E. Gove, the commander of the U. S. S. *Alexander* in respect of a collision which occurred in the waters of the harbour. The *Alexander* is an armed public vessel, the property of the Government of the United States. The commander was in the service and pay of that Government and under the con-

trol of the Secretary of the Navy of the United States. At the period of collision he was employed in active service conveying coal and other stores for the use of the public vessels of the United States Government on the East Asiatic Station and at the actual time of collision he was in command of the ship engaged on such service. The ground of the attorney-general's protest is that the court has no jurisdiction to entertain this action, this method of proceeding being based upon the course pursued by the Admiralty advocate in the case of the *Constitution*. The circumstances of this case are, however, different, for whereas the suit commenced in the case of the *Constitution* was *in rem* for salvage services, this suit is *in personam, i. e.*, against the commander for damages in respect of a collision caused by his alleged negligent navigation. It is not, so far as I know, settled that the principle that ships of war belonging to a nation with whom this country is at peace, are exempt from the civil jurisdiction of our courts, applies to the commanders of such ships when, in he alleged negligent performance of their duties, they cause damage which under other circumstances would render them liable to an action.

The exterritoriality of foreign ships of war was considered at length in the case of the *Parlement Belge*, and in the course of the judgment there are certain dicta which seem, though not in so many words, to warrant the proposition for which the learned attorney-general contended, namely, this exterritoriality of the warships extended in some measure to her officers and crew. If these dicta do bear this extension the commander of the *Alexander* could not be sued for acts committed by him in the course of the performance of his duty. These dicta are as follows: "Has the Admiralty division jurisdiction in respect of a collision to proceed *in rem* against a ship which is at the time of the proceedings the property of a foreign sovereign, is in the possession, control, and employ of the sovereign by means of his commissioned officers and is a public vessel of his state?" Again: "The first question really raises this, whether any part of the public property of any sovereign authority in use for national purposes is not as much exempt from the jurisdiction of any court as is the person of every sovereign." And again: "A public armed ship constitutes a part of the auxiliary force of a nation, acts under the immediate and direct command of the sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and dignity." And finally: "The point and force of this argument in the *Prinz Frederik* is that the public property of every sovereign state, being destined to public use, cannot with reason be submitted to the jurisdiction

of courts of such states, because such jurisdiction, if exercised, must divert the public property from its destined public use, and that by international comity, which provides for the equality of states, if such immunity, grounded on such reasons, exists in each state with regard to its own public property, the same immunity must be granted by each state to similar property of all other states."

We may include with very little stretch of language in the term "property of the state" the services of its paid officers, and the different propositions given in this judgment, together with the reasons, seem, as I have said, to cover the question of a collision by the alleged negligence of the commander of a state vessel and show that this court has no jurisdiction to entertain a personal action for damages. I use the word "cover" advisedly, for it may be that if they were applied without limitation to the *personnel* of this foreign vessel they would be far too wide. Before, therefore, I can hold this to be the law, there is a question to be considered which indeed lies on the surface—why, if the principle does apply to the officers and crew of a public ship, does it not apply to all cases, for the attorney-general's contention was limited to actions resulting from the performance of duties; whereas the principles above stated, if they apply to the officers and crew, are wide enough to cover all cases, for in all cases the result of bringing this action will be to withdraw the defendant from the efficient performance of his official duties and so interfere with the fighting efficiency of his ship. Secondly, there is the very ingenious point raised by the plaintiff's counsel, based on the whole, and especially on the concluding, words of the last quotation given from the judgment in the *Parlement Belge*. "By international comity, if such immunity, grounded on such reasons, exist in each state with regard to its own public property, the same immunity must be granted by each state to similar property of all other states." Thus, concludes the learned counsel, seeing that the immunity claimed for the commander of the *Alexander* does not exist in England with regard to commanders of our own public ships, it can not be recognized as applicable to the commanders of foreign public ships. It is admitted that the commander of a British ship may be sued in an action such as the present, the principle enunciated by Lushington in the *Athol* case and acted on in subsequent cases being that in case of tort or damage committed by vessels of the Crown the vessels can not be touched, but the legal responsibility attaches to the actual wrongdoer only.

The proposition advanced, though, as I say, very ingenious, involves a *non-scquitur;* for admitting that the same immunity must be granted as is granted to similar property owned by any state, *non constat* it may not grant a larger immunity to such

property when belonging to a foreign state. I think, with very great respect, the principle deduced by L. J. Brett from the decision of the *Prinz Frederik* needs some amplification and explanation. Whatever the rule applicable to such a case as the present may be, there can be no question that it depends upon the comity which nations observe in their relations with one another. But comity depends upon mutual concessions between such states, and though it may be perfectly true that some of the rules which depend upon comity deal with subjects which are dealt with by the municipal laws of states under analogous circumstances and dealt with moreover by such laws in an identical or similar fashion, it by no means follows that the methods and principles adopted by the municipal law form the criterion of the methods and principles which ought to be adopted when a case, which depends on a comity, comes for decision. Many cases dealt with by comity much resemble cases dealt with by municipal law, but beyond this it is not safe to go. There is an immunity which hedges the sovereignty—by English municipal law this takes the form of maxims. "The king can do no wrong." Statutes do not bind the Crown without express reference, but there is no such maxim as "Kings can do no wrong." Foreign sovereigns are exempt from the jurisdiction of our courts, because the exercise of such jurisdiction is inconsistent with the independence of their sovereignty, the fundamental principle of comity being the equality of independent states. Or, to take the converse case, there is no such rule at all in the French codes. Is it to be doubted that the King of England is exempt in France from the jurisdiction of the French courts? This illustration is sufficient to explain what I have just said. Other illustrations could, I believe, be found, but it is sufficient to say that so far as the rules of comity have become concrete they are based entirely on the mutual recognition of an equal independence, each refraining from acting so as to interfere with that sovereign's independence, and so far as they have not yet become concrete the mutual recognition, when a case arises for decision, is of the spirit of the law, rather than of its actual provisions—*jus* for *jus*, not *lex* for *lex*. In this I see no possibility of reference in determining what action is to be taken in any given circumstances by any state when its own sovereign or its public service is concerned.

I therefore think that the plaintiff's contention can not be maintained, and that the principles enunciated in the *Parlement Belge*, as applicable to foreign public ships certainly cover the case of the officers and crew on board, because they are under the control and employ of a foreign sovereign in national objects and because the jurisdiction of this court, if exercised, must divert their public service from its distinct public use. I may

refer in this connection to the New Chili Gold Mining Company *v.* Blanco (4 *Times* Law Reports, 346), when the court refused to allow a writ to issue out of the jurisdiction in an action to be brought against the ambassador accredited to the French Government. The judge differed as to the ground of refusal, but it being a matter of discretion the then chief justice said that the court ought not to call upon a foreign ambassador in a foreign country to leave his post and come over to this country. It would interfere with the duties he had to discharge. This I believe to be a sound doctrine, but it is clear that so far the proposition is too widely stated for this case, for unless it be limited in some way, as the learned attorney-general suggests, in law it arrived at something which, as stated, is not far removed from complete exterritoriality of foreign naval officers, putting it on a par in all respects with the exterritoriality of their vessel. There is complete exterritoriality of ambassadors, but that is a case in which the rule of comity (expressed in statutory form in England) has taken concrete form. But it is clear that the case of naval officers has not yet taken such form, for there is no authority that I know of laying down what their immunity is. It is, I think, equally clear that no state has ever claimed such a complete immunity except in case of acts committed on board ship, but on the contrary that when their ships are in foreign waters all states recognize the necessity for their officers, while on shore, conforming to the municipal laws, and that they make no claim for their surrender in case of breach of such laws, even though the result should be to withdraw them from their military service. This same principle applies, of course, to civil actions. This certainly supports the suggestion that the immunity is limited to acts done while in performance of their duty.

In order to make the analysis as complete as I am able, let us assume that while steering a man-of-war's gig during a regatta, at which the officers and sailors on board were only taking part as spectators, the officer in charge so negligently navigated as to run down a sampan, causing its owner damage, I do not believe in such a case any Government would act as in this case the United States Government has felt it its duty to act and ask for the action to be dismissed, and yet the same dicta of the court in the *Parlement Belge* might have been pressed into this service. The common law furnishes instances of analogous cases, where masters have been held not liable for the negligence of their servants, although the negligent act was committed while the servant was driving his master's carriage, because the servant had gone off the route of duty for a diversion of his own. This analogy seems to warrant this limitation to the naval officer's immunity, which was, in fact, suggested by the learned attorney-

general, and that it exists only so long as he forms a part of the machine known as a vessel of war and commits this act of negligence with and by means of such vessel and when it is in whole or in part under his control. But whether such immunity can be claimed by the officer himself I very much doubt. For these reasons the motion of the attorney-general must be sustained and the action dismissed with costs.

This decision establishes the immunity before foreign courts of officers engaged in the naval service when acting in the line of duty.

The decision recognizes as a public officer the master of a collier engaged in the public service under the appointment of the Secretary of the Navy.

Whteher such a master would be a public officer in the sense of the United States statutes is not a matter for a foreign court to decide. His action so far as the foreign state is concerned is the action of a public official of the United States. For this action the United States is responsible.

No suit can therefore be had against the master of the vessel.

This late decision is in accord with the principles that have been developing for many years and in accord with earlier decisions so far as applicable.

Status of United States auxiliary vessels.—By the Regulations for the Naval Auxiliary Service, approved to go into effect April 1, 1907, Chapter I—

1. The naval auxiliary service as hereby organized will include such transports, supply vessels, colliers, and other vessels as may be assigned to it by the Department.

2. These vessels shall be governed by the laws of the United States, by the Navy Regulations as far as they may be applicable, and by these regulations.

Thus the naval auxiliary service is directly recognized as an arm of the Navy Department, and if thus recognized by the United States, foreign states cannot question the fact that such vessels are public vessels.

The Government has also prescribed the course of action for commanders of vessels of the United States in case of collision.

Regulations in regard to collisions.—There should be immediate action in accord with the Regulations for the Navy, 1905, article 422:

(1) In the event of a collision between a ship of the Navy and a merchant vessel, so serious, or under such circumstances as not to admit of immediate repair with the resources at hand, and therefore likely to involve damages, the captain shall order a board of three officers to ascertain all the attendant circumstances, injuries received by the merchant vessel, probable amount of damages, and which of the ships is responsible for the accident; and the master of the merchant vessel concerned shall be notified of the time and place of the meeting of the board and informed that the officers and men of his vessel will be given a hearing by the board, if such hearing is desired. The report shall be prepared in triplicate; one copy shall be forwarded without delay to the commander in chief for the Secretary of the Navy, one retained by the captain of the ship, and the remaining copy given to the master of the merchant vessel, provided that the officers and crew thereof who were witnesses to the collision shall have testified before the board. When repairs have been effected on the spot, a certificate to that effect shall be taken from the master of the merchant vessel and forwarded, through that commander in chief, to the Secretary of the Navy.

(2) If in the presence of a senior officer, the facts shall be immediately reported to him, and he shall order the board.

(3) If the collision occurs in the waters of the United States and results in the loss of life or damage to person or property, the captain shall inform the collector of the district in which it occurs, in accordance with the act of June 20, 1874 (United States Laws relating to the Navy and Marine Corps, 1898, page 136).[a]

[a] A law of June 20, 1874, requires that after July 1, 1874, "whenever any vessel of the United States has sustained or caused any accident involving the loss of life, the material loss of property, or any serious injury to any person, or has received any material damage affecting her seaworthiness or her efficiency, the managing owner, agent, or master of such vessel shall within five days after the happening of such accident or damage, or as soon thereafter as possible, send, by letter to the collector of customs of the district wherein such vessel belongs or of that within which such accident or damage occurred, a report thereof, signed by such owner, agent, or master, stating the name and official number (if any) of the vessel, the port to which she belongs, the place where she was, the nature and probable occasion of the casualty, the number and names of those lost, and the probable amount of the loss or damage to the vessel or cargo; and shall furnish, upon the request of either of such collectors of customs, such other information concerning the vessel, her cargo, and the casualty as may be called for; and if he neglect or refuse to comply with the foregoing requirement after a reasonable time, he shall incur a penalty of one hundred dollars." (18 Statutes at Large, chap. 344, §10.)

(4) He shall, if the collision occurs in a foreign port, take such measures as may be required by the port regulations, informing the captain of the port, should it be necessary.

(5) The foregoing provisions of this article shall apply, as far as practicable, in all cases of collision by a ship of the Navy with a wharf, float, or other object.

(6) Whenever, in consequence of injuries sustained in a foreign port by a United States vessel, as a result of a collision between it and a foreign merchant vessel, clearly the fault of the latter, it may become necessary or desirable, on the part of the commanding officer of the vessel, to libel the latter vessel, such libel proceedings shall be instituted in the name of the United States, and not in the name of such commanding officer. In all such cases it shall be the duty of the commanding officer concerned, or of the senior officer present, according to circumstances, immediately to inform the Department of his action.

Résumé.—The situation under consideration is as follows:

A United States auxiliary collier commanded by an officer appointed by the Secretary of the Navy is in a harbor of State X. The collier collides with and injures a foreign vessel. The owner of the foreign vessel brings suit against the commander of the collier for damages under the civil law, claiming that the status of the collier is uncertain, and that the commander would in any case be liable as would the commander of a ship of the State X, the commanders of whose vessels, public and private, are liable in the civil courts of that state, under similar circumstances.

The fact that the commanding officer is appointed by the Secretary of the Navy rather than under the usual commission is not a matter of which any foreign state may properly take cognizance, provided his conduct is regulated by government orders and provided the government is responsible for his action. In this case, so far as the foreign state is concerned, the auxiliary collier is a vessel of the United States Navy and is therefore a public vessel. The precedents, opinions, and regulations show that public vessels are not subject to the jurisdiction of a foreign state in such a situation as is under consideration.

The recent Regulations for the Naval Auxiliary Service of the United States make such a vessel as an auxiliary collier a part of the naval force to be governed by the Navy Regulations as far as these may be applicable.

These Regulations for 1905 provide, article 422, for the course of action in cases of collision.

The aim as set forth in precedents, opinions, and regulations is not to make it possible for the state which they represent to avoid responsibility for acts of public vessels while in a foreign harbor, but rather to avoid complications which might follow if a public vessel is detained during the period of suit before a court.

In order not to interfere with the action of a public vessel and at the same time not to deprive the owner of the foreign vessel which had been in collision of any just compensation for damages, it has become common and in general seems to have worked satisfactorily to present claims through the regular diplomatic channels. Accordingly, the action of the responsible officer should be determined by the above considerations.

Conclusion.—The senior officer, acting in accordance with principle, precedent, and regulations, should appoint a board of inquiry and maintain that the suit should not be brought against the master of the auxiliary collier, but that the claims should be referred to the United States Government through diplomatic channels.

Situation III.

While there is a war between States X and Y, and the United States neutral, a war vessel of State X captures a merchant vessel flying the flag of the United States, and while returning to the home port of State X brings the merchant vessel into a port of State Z, which is neutral, and in which port there is a war vessel of the United States. The commander of the war vessel of State X orders the merchant vessel to lower the flag of the United States. The captain of the merchant vessel refuses. The captain of the war vessel of State X orders the flag pulled down. The captain of the merchant vessel protests against this act to the commander of the war vessel of the United States.

Should the commander of the war vessel of the United States take any action?

SOLUTION.

The commander of the United States war vessel should protest to the neutral authorities of State Z against the action of the captain of the war vessel of State X in forcibly hauling down the flag of a seized merchant vessel of the United States while in a neutral port of Z and before the decision of a prize court. He should also report the facts to his home government for further action.

NOTES ON SITUATION III.

Early opinion.—Sir William Scott in 1799 announced as "principles of universal jurisprudence applicable to all courts" that—

> In later times an additional formality has been required, that of a sentence of condemnation, in a competent court, decreeing the capture to have been rightly made, *jure belli;* it not being thought fit, in civilized society, that property of this sort should be converted without the sentence of a competent court pronouncing it to have been seized as the property of an enemy, and to

be now become *jure belli* the property of the captor. The purposes of justice required that such exercises of war should be placed under public inspection, and therefore the mere *deductio infra praesidia* has not been deemed sufficient. No man buys under that title; he requires a sentence of condemnation as the foundation of the title of the seller; and when the transfer is accepted he is liable to have that document called for, as the foundation of his own. From the moment that a sentence of condemnation becomes necessary it imposes an additional obligation for bringing the property, on which it is to pass, into the country of the captor; for a legal sentence must be the result of legal proceedings in a legitimate court, armed with competent authority upon the subject-matter and upon the parties concerned—a court which has the means of pursuing the proper inquiry and enforcing its decisions. (The *Henrick* and *Maria*, 4 C. Robinson's Admiralty Reports, p. 43.)

In his opinion on the *Vrow Elizabeth*, rendered in 1803, Sir William Scott says that, according to the established principles of law—

It has been decided that a vessel sailing under the colours and pass of a nation is to be considered as clothed with the national character of that country. (5 C. Robinson's Admiralty Reports, p. 4.)

Later opinion.—In 1862 Mr. Justice Davis delivered the opinion of the court in the case of the *Nassau* to the effect that—

It is the practice with civilized nations, when a vessel is captured at sea as a prize of war, to bring her into some convenient port of the captor for adjudication. The title is not transferred by the mere fact of capture, but it is the duty of the captor to send his prize home, in order that a judicial inquiry may be instituted to determine whether the capture was lawful, and if so to settle all intervening claims of property. Until there is a sentence of condemnation or restitution, the capture is held by the government in trust for those who, by the decree of the court, may have the ultimate right to it.

The fact of capture determines the jurisdiction, and not the filing of a libel. When captured as prize of war the property is in the custody of the law, and remains there to await the decision of a prize court, and, if condemned, all claims to the property are by it adjusted. Any other rule would work great hardship to captors and tend to cripple the operations of a government during time of war. (4 Wallace, U. S. Supreme Court Reports, 635.)

In a decision of 1902 it is stated that—

Until condemnation captors acquire no absolute right of property in a prize, though then the right attaches as of the time of the capture, and it is for the government to determine when the public interests require a different destination. (U. S. *v.* Dewey, 188 U. S. Supreme Court Reports, 254.)

Case of the Malacca.—Professor Lawrence sets forth the case of the *Malacca*, which involved the change of flag before adjudication by a prize court, as follows:

We are now in a position to consider the case of the *Malacca* and deal with the legal points which have arisen in connection with it. On July 4 the Russian volunteer fleet steamer *Peterburg* passed the Bosphorus and the Dardanelles, after having been detained by the Turkish authorities for some hours, in the course of which explanations were exchanged with the Russian ambassador at Constantinople. On July 6 she was followed by the *Smolensk*. Both flew the commercial flag. Each declared she was a commercial ship. Neither could have passed the straits in any other capacity. They maintained the same character when going through the Suez Canal. The *Petcrburg* certainly, and possibly the *Smolensk* also, engaged pilots for the Red Sea as a vessel of commerce. But soon after leaving Suez she ran up the Russian naval ensign. Guns were brought out of her hold and mounted. Her armament was soon complete. She assumed the character of a war ship and proceeded to cruise against neutral commerce. On July 11, off Jeddah, she stopped and searched two British vessels, the *Menelaus* and the *Crewe Hall*, but after being detained for some time they were allowed to proceed. On July 13 she captured the Peninsula and Oriental Company's steamer *Malacca* to the north of the island of Jebel-Zukkur and brought her to Suez on July 19. The *Malacca* was passed through the canal in the custody of a Russian prize crew and flying the Russian naval flag, though, in the absence of any sentence of a prize court condemning her, she was still in law a British vessel. She left Port Said on July 21, her destination being unknown, but it was understood that she would be taken to Libau for trial and adjudication on a charge of carrying contraband of war. (War and Neutrality in the Far East, 2d ed., p. 205.)

Sir Charles Harding, the British ambassador at St. Petersburg, made a strong protest. Later "a compromise" was made. Of this Professor Lawrence says:

It is satisfactory to know that the British remonstrance was not without effect. What Mr. Balfour described as "a compromise" was reached. It was agreed that the *Malacca* should be taken

to Algiers and there released after "a purely formal examination," and an assurance from the British consul that the military stores were the property of the British Government, and that the rest of the cargo was innocent. These formalities were gone through on July 27. At sunset the Russian flag, which ought never to have been hoisted, was hauled down, and at sunrise the next morning the British flag took its proper place at the masthead. With regard to the *Peterburg* and the *Smolensk*, they "were no longer to act as cruisers," and any vessels captured by them were to be immediately released. This latter part of the agreement was carried out to the full by the liberation on July 27 of two British vessels, the *Ardova* and the *Formosa*, which had been seized in the Red Sea. No admission was made of the general principle that vessels of the volunteer fleet which had passed through the straits as merchantmen were legally incapable of acting as ships of war. Instead, it was asserted that the two steamers whose conduct was questioned had "received a special commission, the term of which had already expired;" and thus the cessation of their attacks on neutral commerce was accounted for without acceptance of the British contention.

We may admit that a compromise was necessary, while at the same time we regret some of the conditions which were agreed upon. The examination of the *Malacca* at Algiers was contrary to the fundamental principle for which we contended. The Russian Government published an official statement on August 2, representing it as "a fresh visit." It would be hard to argue that it was nothing of the kind, though, as it took place in a neutral port, it was absolutely irregular from beginning to end. The assurance of the British consul as to the innocence of the cargo implied that the arresting vessel had a right to inquire into the matter; whereas the head and front of our argument had been that the arrest, visit, and detention were wrongful acts, because the ship which performed them had no legal capacity to do so." (War and Neutrality in the Far East, 2d ed., p. 212.)

The attitude of the Russian Government on the seizure and release of the *Malacca* is indicated by a statement in the Official Messenger of August 2, 1904.

From the beginning of the Russo-Japanese war the Imperial Government took measures to prevent the transport of contraband of war to Japan by vessels of neutral countries. In the regulations sanctioned by the Czar on February 14, 1904, which Russia proposed to follow during the war, a list was given of articles regarded by us as contraband of war. It was also declared that the military and maritime authorities would reserve to themselves the right of rigidly executing the decision contained in the

regulations for naval prizes sanctioned by the Czar on March 27, 1895, and in the instructions confirmed by the Council of Admiralty on September 20, 1900, regarding the procedure for stopping, visiting, and seizing, as well as for carrying off and delivering over, vessels and cargoes seized.

The vessels *St. Petersburg* and *Smolensk*, of the volunteer fleet, having received a special command, the term of which has already expired, on proceeding to their destination, acted in accordance with the above decisions, and while passing through the Red Sea stopped and visited all suspected vessels they encountered in those waters. It was under these conditions that the commander of the *St. Petersburg* stopped, among others, the British ship *Malacca*, the captain of which refused to show the ship's papers relating to the cargo, a refusal which led to the seizure of the vessel and the decision to send it to Port Alexander III, Libau, with a view to throwing light on the matter.

Nevertheless, in view of an official statement of the British Government that the *Malacca* was carrying British state cargo, the Imperial Government, acting in agreement with the British Government, decided that a fresh visit should be paid to the seized vessel at the nearest port on its route in the presence of a British consul. The visit took place at Algiers. The British Consul-General officially certified that the military stores on board the *Malacca* continued to be the property of the British Government, and that the rest of the cargo was not contraband of war. Taking this attestation into consideration, the Imperial Government decided to liberate the cargo and vessel.

This decision must not, however, be interpreted as a renunciation by the Imperial Government of its intention to dispatch alike cruisers and war ships in general to prevent the carrying of contraband of war for our enemy.

Seizure of enemy differs from seizure of neutral vessels.—The seizure of an enemy private vessel is an act very different in character and intent from that of seizure of a neutral private vessel. The enemy vessel is brought before the court to determine its disposition. The act of seizure, if made according to the recognized rules of international law, is not in question. The burden of proof rests upon the seized vessel.

The neutral, however, should be freed from all interference in prosecution of proper neutral activities. The presumptions are in favor of the neutral. The burden of proof of guilt rests on the belligerent seizing the neutral.

The seizure of a vessel is in effect an act of war. In case the vessel is the property of a belligerent it is re-

garded as legitimate. In case the vessel is the property of a neutral such vessel must be involved in the war in order to justify the seizure, otherwise it is an act of war against a neutral, and being without sanction renders the belligerent making the seizure liable to damages. Seizure of a neutral is justified to prevent an act which would involve participation in the hostilities, as to prevent the delivery of contraband or to penalize the neutral for complicity in the hostilities, as in seizure of a neutral vessel returning from a violation of blockade.

There is a reference to the seizing of enemy property and the general immunity of neutral territory in the case of the *Vrow Anna Catharina:*

> The right of seizing the property of the enemy is a right which extends, generally speaking, universally wherever that property is found. The protection of neutral territory is an exception to the general rule only; it is not therefore to be considered as disrespectful to any government that the fact on which such claims are founded should be accurately examined. (5 C. Robinson's Admiralty Reports, 15.)

The exemption of neutral territory from all acts involving hostility is now most firmly maintained.

> The object of searching ostensible neutrals is to get evidence as to the fact of neutrality and if the cargo be not enemy's property; or, if neutral, whether they are carrying contraband; or whether the vessels are in the service of the enemy in the way of carrying military persons or dispatches or sailing in prosecution of an intent to break blockade. (*The Jane*, 37 U. S. Court of Claims, 24, Dec. 2, 1901.)

These opinions and precedents show that neutral vessels are seized by one belligerent in order to determine whether their action has aided or is evidently to aid the opposing belligerent. The action of the seizing belligerent is justified to the extent that it may be necessary to ascertain these facts. All neutrals concerned, the seized neutral and others affected by the seizure, are entitled to exemption from the effects of war in which they have no participation.

Regulations as to seizure.—The regulations of various states and action under these regulations show the general tendency.

The Russian Regulations on Maritime Prize give the following as the method of conducting detained vessels into port:

22. Detained vessels and cargoes are conducted by the detaining vessel into Russian ports, and if there are none such in the vicinity, then into the ports of an allied power or to the active Russian fleet (the fleet engaged in operations). In case of storm or other extreme necessity the detaining vessel may, together with the detained vessel, seek shelter in the port of a neutral power. Regarding the period and conditions of remaining in port, the commander of the detaining vessel is obliged to submit to the rules established on this subject by the local government.

In the "Instructions concerning stopping, examining, etc.":

42. An imperial vessel, while conducting away detained vessels, may enter the ports of a neutral power which has not forbidden in its declaration of neutrality (or other official document) the visitation of ports by war vessels of the belligerent parties with prizes.

Similarly an imperial cruiser may seek refuge in a port of a neutral power, together with captured vessels, in the case of a storm or other extreme necessity (for instance, a breakdown in the engines, insufficiency of supplies, or in case of pursuit by an enemy of superior strength), in which case the commander of the imperial vessel must submit to the rules established by the local government with regard to the period and other conditions of the sojourn in the neutral port. (U. S. Foreign Relations, 1904, pp. 738, 753.)

The Russian Regulations on Maritime Prizes enunciate the following doctrine in regard to the nationality of a vessel:

The nationality of a vessel is determined according to the laws of the nation under whose flag it sails or to whose navy it claims to belong. Merchant vessels acquired from a hostile power or its subjects by persons of neutral nationality are acknowledged to be hostile vessels unless it is proven that the acquisition must be considered, according to the laws of the nation to whom the purchaser belong, as having actually taken place before the purchasers received news of the declaration of war, or that the vessels acquired in the manner mentioned, although after the receipt of such news, were acquired quite conscientiously, and not for the purpose of covering hostile property.

In regard to the treatment of war vessels the Russian Regulations on Maritime Prizes provide:

27. The confiscation of detained war vessels and cargoes takes place by order of the proper naval authority. The confiscation of other vessels and cargoes subject to detention does not take place otherwise than by virtue of a decision of a prize court.

The instructions issued by Spain, April 24, 1898, prescribe that—

3. Seas subject to the sovereign jurisdiction of neutral powers are absolutely inviolable; right of visit may not, therefore, be resorted to within them, even if it be alleged that it was attempted to exercise such right in the open sea, and that, on chase being given, and without losing sight of the vessel pursued, the latter penetrated into neutral waters.

Neither may the violation of the rights attaching to such waters be justified under the pretext that the coast washed thereby was undefended and uninhabited.

9. The visit is not an act of jurisdiction of the part of the belligerent; it is a natural means of legitimate defense allowed by international law, lest fraud and bad faith should assist the enemy. The right should therefore be exercised with the greatest moderation by the belligerent, special care being taken to avoid causing the neutral any extortion, damage, or trouble that is not absolutely justifiable.

In consequence of this the detention of the ship visited should always be as short as possible, and the proceedings restricted as far as they can be, their exclusive object being, as explained, for the belligerent to ascertain the neutrality of the ship, and in case of neutrality (if bound for a port of the enemy) the inoffensive and neutral description of its cargo.

It is not necessary, therefore, to demand during the visit any other documents than those proving these two conditions, for what the belligerent requires is to prevent any damage, favoring or assisting the enemy; to prevent assistance and help being furnished to them now that may contribute directly to the prolongation of the war, and not to be assured that all ships belonging to neutral powers are provided with all the documents required by the laws of their country.

The British Admiralty Manual of Prize Law states that—

299. The Commander, however, must bear in mind that he cannot take the Vessel into a Neutral Port against the will of the Local authorities; and that under no circumstances can proceedings for Adjudication be instituted in a Neutral Country.

300. Both the Cruiser and, if admitted, her Prize are by the Comity of Nations exempt from the local jurisdiction. (Page 85.)

Regulations in regard to use of flag.—The French "Instructions contemporaires" of 1870, article 3, state:

Les prises naviguent avec le pavillon et la flamme, insignes des bâtiments de l'État.

Under certain circumstances the commander of a war vessel may, according to the British Manual of Naval Prize Law, require the vessel seized as probably good prize to lower her flag.

As soon as the Commander has come to the determination to detain the Vessel, he should give notice to the Master, and may state to him the ground on which the Detention is made. The Commander should then without any delay secure possession of the Vessel, by sending on board one of his Officers and some of his Crew. If by reason of rough weather or other circumstances this is impracticable, the Commander should require the Vessel to lower her flag, and to steer according to his orders. (Page 69.)

Article LXVII of the Japanese Regulations of 1904 follows in the main the British Manual.

ART. LXVII. If the captain of the man-of-war decides to capture a vessel he shall inform her master of the reason, and shall take possession of the vessel by sending one officer and the required number of petty officers and men. If on account of bad weather or any other reason it is impossible to dispatch these officers and men, the captain of the man-of-war shall order the vessel to haul down her colors and to steer according to his direction. If the vessel does not obey the orders of the captain of the man-of-war, he may take any measures required for the occasion.

Certain clauses of the Danish proclamation of neutrality of April 27, 1902, show the modern attitude on the treatment of prize:

The belligerents must not commit hostile acts in Danish harbors or waters or make use of the same as base for operations at sea against each other or for the purpose of facilitating such operations. Nor must they use such harbors or waters for augmenting or renewing military equipment or for recruiting purposes.

Prizes must not be brought into a Danish harbor or roadstead except in evident case of stress, nor must prizes be condemned or sold therein.

In the Notice from the Danish Ministry of Foreign Affairs is the following:

ARTICLE 1. When a Danish merchant vessel at sea is hailed by an armed ship belonging to either belligerent, she has, at the request of the officer in command, without opposition, to produce the ship's papers, i. e., the certificate of nationality and registry (or in default of such a one, a provisional certificate of nationality delivered by a Danish consul), the crew list, the clearance papers, and the manifest. It is forbidden to conceal, to destroy, or to throw overboard papers concerning the ship or her cargo as well before as during the search. No Danish ship is allowed to have double papers or to fly another flag than the Danish flag.

The United States Navy Regulations of 1876, chapter 20, state that—

14. A neutral vessel seized is to wear the flag of her own country until she is adjudged to be a lawful prize by a competent court. The flag of the United States, however, may be exhibited at the fore, to indicate that she is, for the time, in the possession of officers of the United States.

This does not appear, however, in subsequent issues of the Navy Regulations.

Opinions as to use of flag.—Dupuis says:

L'envoi du vaisseau capturé à un port belligérant, avec tous les éléments propres à faire juger si la capture est légitime, est, en principe, obligatoire. L'intervention des cours de prises constitue une garantie nécessaire contre les abus du droit de capture; or, cette garantie ne saurait être pleinement efficace qu'autant que les documents et les objets saisis se trouvent à la disposition des cours appelées à statuer. (Le droit de la guerre maritime, No. 260, p. 331.)

Kleen, writing of the procedure in case of seizure, says:

Le navire, gardant son pavillon jusqu'au jugement, sera conduit au port du tribunal par un commandant et un équipage délégués du capteur et suffisants pour diriger et manoeuvrer le navire sous sa responsabilité. Pendant le trajet, rien ne peut être touché sans permission du capitaine et sans urgence pour la conservation des objets. (2 La Neutralité, § 213, p. 522.)

The procedure in visit, search, and seizure is so carefully prescribed that in the exercise of such a delicate right there should be no action beyond that uniformly permitted and sanctioned by international law.

Oppenheim says in regard to the treatment of prize that—

As soon as a vessel is seized she must be conducted to a port where a prize court is sitting. As a rule the officers and crew sent on board the prize by the captor will navigate the prize to the port. This officer can ask the master and crew of the vessel to assist him, but if they refuse they can not be compelled thereto. The captor need not accompany the prize to port. In the exceptional case, however, where an officer and crew can not be sent on board and the captured vessel is ordered to lower her flag and steer according to orders, the captor must conduct the prize to port. (2 International Law, p. 198, § 193.)

In 1886 the flag of a fishing vessel was hauled down in a Canadian port on the ground that the fishing vessel had violated certain local regulations.

Mr. Bayard, in a letter to Mr. Phelps, says:

It seems hardly necessary to say that it is not until after condemnation by a prize court that the national flag of a vessel seized as a prize of war is hauled down by her captor. Under the fourteenth section of the twentieth chapter of the Navy Regulations of the United States the rule in such cases is laid down as follows:

"A neutral vessel, seized, is to wear the flag of her own country until she is adjudged to be a lawful prize by a competent court."

But, *a fortiori*, is this principle to apply in cases of customs seizures, where fines only are imposed and where no belligerency whatever exists? In the port of New York, and other of the countless harbors of the United States, are merchant vessels flying the British flag which from time to time are liable to penalties for violations of customs laws and regulations. But I have yet to learn that any official, assuming, directly or indirectly, to represent the Government of the United States, would under such circumstances order down or forcibly haul down the British flag from a vessel charged with such irregularity; and I now assert that if such act were committed, this Government, after being informed of it, would not wait for a complaint from Great Britain, but would at once promptly reprimand the parties concerned in such misconduct and would cause proper expression of regret to be made. (For. Rel. U. S., 1886, p. 370.)

The principle that enemy goods and ships are liable to seizure being at present admitted, there can be little objection raised to placing the national flag of the capturing vessel over a seized vessel belonging to a belligerent. It does pass, if good prize, to the state of the captor upon capture. It is brought in for adjudication.

In regard to a neutral vessel, the principle is quite otherwise. The neutral is only seized and held pending the decision of the prize court.

The Austrian regulations seem, therefore, to be in accord with the best opinion. These are to the effect that if an enemy vessel is captured the imperial standard should be hoisted at once at the peak of the captured vessel.

If a neutral vessel is seized it should carry its own flag till it is declared good prize, although the Austrian colors may be hoisted at the fore to indicate that the vessel is under the direction of a war ship of Austria.

The position is similar to that in the United States Navy Regulations of 1876.

Summary.—In the situation under consideration there are several parties concerned: (1) The authorities of the neutral state into which the vessel has been brought; (2) the war vessel of the United States; (3) the seized merchant vessel of the United States, a neutral; (4) the war vessel making the seizure.

(1) *Relations of the neutral state.*—The authorities of neutral states have full right to forbid the entrance of vessels with prize. They have the full right to regulate the conditions of entrance and sojourn of any vessels admitted with prize during war. As neutrals they are under obligation to see that no acts of war take place within their jurisdiction. The capture within neutral jurisdiction of a vessel of which the pursuit was begun outside of neutral territory is not allowed. The neutral is entitled to claim that its territory should not be the scene of any proximate act of war. The forcible hauling down of the flag of the merchant vessel of the United States is an act approximating war. The transfer of flag is an indication of the transfer of sovereignty. A forcible transfer of this kind is of the nature of capture which is forbidden in neutral territory. As ships of war with prize are generally admitted to neutral ports only on sufferance, it is proper for the neutral authorities to demand that the status of the prize be not changed by the use or threat of force or in any manner other than of its

own volition during the sojourn within port. As the hauling down of a neutral flag and the raising of a belligerent flag in its place under orders of the belligerent within a neutral port would be in the nature of evidence of transfer of authority, such a transfer would properly be an act to which the neutral would object.

The neutral, therefore, has a right to protest if a belligerent entering its port with prize performs any such act in derogation of his sovereignty. The forcible hauling down of any neutral flag would be an act of such character. Therefore the neutral would have cause for protest.

(2) *Position of the war vessel of the United States.*—The war vessel of the United States is under the general restrictions as regards conduct in a foreign state. It may not take any action in derogation of the sovereignty of the neutral port of State Z. To use force to restore the flag of the merchantman of the United States would be an offense against State Z and would imply that State Z was unable to secure the enforcement of proper regulations in its ports. Both the war vessel of State X and its prize while in the neutral port of Z are within its jurisdiction, and any act of force would be an offense against the neutral state. Accordingly the commander of the United States war vessel would have no right to interfere other than by stating the facts and making protest against the action of the captain of the war vessel of State X. This protest should be made to the authorities of neutral State Z who have jurisdiction, and protest may be made also directly to the captain of the war vessel of State X by the captain of the United States war vessel, if he deems it expedient.

(3) *Right of captured neutral vessel to flag.*—The captured neutral merchant vessel of the United States has a right to carry its flag until condemned, and it is proper that it should do so in order that in case its captor should be attacked by the other belligerent the status of the prize may be known, or in case it is sent in under a prize crew that its status may similarly be evident. In flying the enemy's flag in place of its proper flag its status would be

that of an enemy vessel so far as the opposing belligerent was concerned. Until condemnation in a regular court its status is not changed and it should be made liable to the consequences of seizure only. Therefore it has the right to its own flag till condemned.

(4) *Rights of war vessel of State X.*—The war vessel of belligerent State X which made the capture has no rights except that of peaceable sojourn in a neutral port of State Z, which has admitted the war vessel with its prize. The forcible hauling down of the neutral flag is an act beyond those permitted in peaceful sojourn and is beyond the rights of the captain.

The neutral merchant vessel has a right to its flag as evidence of its nationality and for its protection till condemned. The merchant vessel is seized only in order that it may be brought before a court. It is regarded as innocent until condemned. Such use of force by the officers of State X against its flag would be an anticipation of the judgment of the prize tribunal. The captain of the merchant vessel is right in declining to haul down his flag.

As the neutral state is responsible for acts which take place within its jurisdiction, the proper authority to which the commander of the United States war vessel should look is that of the neutral state. As the neutral merchantman of the United States is entitled to her flag until condemned and as the hauling down of the United States flag by force would be an evidence of transfer of jurisdiction which should not take place in a neutral port, the commander of the United States war vessel would be justified in taking action.

Conclusion.—The commander of the United States war vessel should protest to the neutral authorities of State Z against the action of the captain of the war vessel of State X in forcibly hauling down the flag of a seized merchant vessel of the United States while in a neutral port of Z and before the decision of a prize court. He should also report the facts to his home government for further action.

Situation IV.

In the time of war between the United States and State Z, a merchant vessel of State Z is overtaken by a war vessel of the United States. The merchant vessel resists capture and tries to escape, but is captured and found to have on board certain goods which the captors wish for immediate use, but which are said by the captain and seem in fact to belong to neutral parties.

Should these goods be treated as hostile? What action could be taken?

Solution.

The goods should not be treated as hostile.

The goods should not be taken from the vessel except for better preservation thereof or unless such articles are absolutely needed for the use of vessels or armed forces of the United States. The appropriation of innocent neutral goods must be justified by military necessity, not by mere wish or desire.

Notes on Situation IV.

Status of merchant vessels as regards capture.—There is a wide difference between the capture of an enemy merchant vessel and the capture of a neutral merchant vessel. The enemy vessel is captured as a proper act in the conduct of the war. The presumption in the case of capture of an enemy vessel is that it is good prize and the burden of proof of exemption rests upon the enemy. The presumption in the case of the capture of a neutral vessel is that it is exempt until proved good prize by the proper authorities. The liability to capture is the deterrent which is present to the neutral to cause him to refrain from becoming involved in the hostilities. The neutral vessel is, if innocent, liable only to inconvenience. Resistance by force by a neutral vessel would be taken as evidence of guilt.

Resistance by force by an enemy vessel would be but a natural attempt to avoid certain penalties.

Resistance in general.—It is not easy to determine what kind of resistance constitutes a sufficient ground for seizure, and the courts have therefore held that they can not so differentiate, but that any resistance will render a vessel liable to seizure. In the case of the *Jane* it was decided that an American merchant vessel attempting flight from an unknown vessel but heaving to on discovering that it was a French cruiser that was firing upon her, was guilty of resistance to search. (*The Jane*, 37 Court of Claims, U. S., 24.) Not even grave apprehension of illegal condemnation will justify a neutral merchant vessel in resisting the right of search by a belligerent. (*The Rose*, 37 Court of Claims, U. S., 290.)

Regulations as to resistance.—The British regulations in regard to resistance in general are as follows:

RESISTANCE.

145. The Commander should detain any Vessel which forcibly resists Visit or Search.

146. A mere attempt at escape is, in itself, no ground for Detention, though the Commander will not be liable for injury which he may cause to the Vessel, or her Crew, in forcibly preventing her escape.

147. The Penalty for Resistance by the Master of a Neutral Vessel is the confiscation of the Vessel and the Neutral cargo. Resistance by the Master of an Enemy's private ship does not forfeit a Neutral cargo, which will, however, be condemned if found on board an armed Ship of the Enemy.

RESISTANCE BY NEUTRAL CONVOY.

148. Any resistance made by a Neutral Convoying Ship to the lawful Visit and Search of a Vessel under her escort will justify the Detention both of the Convoying Ship and of all Vessels convoyed by her.

149. If, upon the Visit and Search of a Vessel under Neutral Convoy, it shall appear that the Master set sail with instructions to make an armed resistance to Search, the Vessel should be Detained.

ENEMY CONVOY.

150. Vessels under Enemy Convoy are, from that circumstance alone, liable to Detention. (Admiralty Manual Prize Law, 1888, p. 44.)

The Japanese Regulations of 1904 state:

ART. XXXVII. Any vessel that comes under one of the following categories shall be captured, no matter of what national character it is:

1 Vessels that carry persons, papers, or goods that are contraband of war.

2. Vessels that carry no ship's papers, or have willfully mutilated or thrown them away, or hidden them, or that produce false papers.

3. Vessels that have violated a blockade.

4. Vessels that are deemed to have been fitted out for the enemy's military service.

5. Vessels that engage in scouting or carrying information in the interest of the enemy, or are deemed clearly guilty of any other act to assist the enemy.

6. Vessels that oppose visitation or search.

7. Vessel's voyaging under the convoy of an enemy's man-of-war.

ART. XLVIII. Vessels that have opposed visit or search, and all the goods belonging to the owners of such vessels, shall be forfeited.

The instructions issued for the Spanish navy in 1898 provided:

In consequence of the visit the vessel is captured in the following cases:

* * * * * * *

if active resistance is offered to the visit, that is, if force is employed to escape it.

General Orders, No. 492, of the Navy Department, June 20, 1898, stated that—

A vessel under any circumstances resisting visit, destroying her papers, presenting fraudulent papers, or attempting to escape should be sent in for adjudication.

Neutral goods on armed vessels.—In the case of the *Fanny*, neutral Portuguese property was placed on board a British armed ship which was captured by an American schooner and afterwards was retaken by a British war vessel. It was decided by the British court that neutral property thus shipped was, if captured, liable to condemnation, and if recaptured, subject to salvage. (1 Dodson's Admiralty Reports, 443.) An American decision of the same period (1815) maintained, though with strong dissent, that—

A neutral may lawfully employ an armed belligerent vessel to transport his goods, and such goods do not lose their neutral character by the armament, nor by the resistance made by such vessel, provided the neutral do not aid in such armament or resistance, although he charter the whole vessel, and be on board at the time of the resistance. (*The Nereide*, 9 Cranch, U. S. Supreme Court Reports, p. 388.)

This decision was affirmed in the case of the *Atlanta* in 1818. (3 Wheaton, U. S. Supreme Court Reports, 415.)

The British point of view, that neutral goods upon an armed vessel of a belligerent would be liable to confiscation, seems to be generally held at present, though such cases are little likely to arise.

Early British opinion as to merchant vessels.—The general subject of resistance to visit and search was considered quite fully in the case of the *Maria*. Sir William Scott mentions certain principles which he regards as incontrovertible. He maintains—

that the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, the destinations what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. The right is so clear in principle that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured it is impossible to capture. Even those who contend for the inadmissible rule that *free ships make free goods* must admit the exercise of this right, at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice, for practice is uniform and universal upon the subject. The many European treaties which refer to this right refer to it as preexisting, and merely regulate the exercise of it. All writers upon the law of nations universally acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode

as possible; but, soften it as much as you can, it is still a right of force, though of a lawful force—something in the nature of civil process where force is employed, but a lawful force which can not be lawfully resisted. For it is a wild conceit that wherever force is used it may be lawfully resisted. The only case where it can be so in matters of this nature is in a state of war and conflict between two countries, where one party has a perfect right to attack by force and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other no such conflicting rights can possibly coexist.

Later in the same case he sets forth the penalty:

The penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. For proof of this I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public law. In Book III, c. vii, sect. 114, he expresses himself thus: "On ne peut empecher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres que l'on recontre en mer. On est donc en droit de les visiter. Quelqes nations puissantes ont refusé en différents temps de se soummettre à cette visite; *aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme étant bonne prise.*" Vattel is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact that such is the existing practice of modern Europe. And to be sure, the only marvel in the case is that he should mention it as a law merely modern, when it is remembered that it is a principle not only of the civil law (on which great part of the law of nations is founded), but of the private jurisprudence of most countries in Europe, that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle, we find in the celebrated French Ordinance of 1681, now in force, article 12, "*That every vessel shall be good prize in case of resistance and combat;*" and Valin in his smaller Commentary, p. 81, says expressly that although the expression is in the conjunctive, yet that the *resistance alone is sufficient.* He refers to the Spanish Ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, "*in case of resistance or combat.*" And recent instances are at hand and within view in which it appears that Spain continues to act upon this principle. The first time in which it occurs to my notice on the inquiries I have been able to make in the institutes of our own country respecting matters of this nature, excepting what occurs in the Black Book of the Admiralty, is the order of council, 1664, article 12, which directs,

"That when any ship met withal by the royal navy or other ship commissionated shall fight or make resistance, the said ship and goods shall be adjudged lawful prize," and, "deliberate and continued resistance to search on the part of a neutral vessel to a lawful cruiser is followed by the legal consequence of confiscation." (*The Maria*, 1 C. Robinson's Admiralty Reports, p. 340.)

If the ship resisting or attempting to rescue itself is a neutral the cargo would be liable to confiscation. If an enemy ship persists or attempts to escape the act is one against which the captor is supposed to be on his guard. In the case of the *Catherina Elizabeth*, in 1804, it was held of the attempt of an enemy master to rescue his vessel that—

It could only be the hostile act of a hostile person who was prisoner of war, and who, unless under parole, had a perfect right to attempt to emancipate himself by seizing his own vessel. If a neutral master attempts a rescue he violates a duty which is imposed upon him by the law of nations, to submit to come in for inquiry as to the property of the ship or cargo, and if he violates the obligation by a recurrence to force the consequence will undoubtedly reach the property of his owner, and it would, I think, extend also to the confiscation of the whole cargo entrusted to his care and thus fraudulently attempted to be withdrawn from the rights of war. With an enemy master the case is very different. No duty is violated by such an act on his part, *lupum auribus teneo*, and if he can withdraw himself, he has a right to do so. (5 C. Robinson's Admiralty oReports, p. 232.)

Opinions of text-writers.—Dupuis writes somewhat at length of resistance to visit and capture. He says:

Les neutres sont dans l'obligation de souffrir la visite, quelque préjudiciable qu'elle leur puisse être; mais ils peuvent être grandement tentés de s'y soustraire à cause des désagréments qu'elle entraine, plus grandement encore lorsque leur conduite, n'étant pas irréprochable, les expose à la saisie.

Le procédé le plus simple pour y échapper consiste à fuir, au lieu d'obtempérer à la sommation du belligérant. Le belligérant peut alors employer la force sans encourir aucune responsabilité à raison des dommages que son artillerie peut causer au fugitif. Mais ces dommages sont considérés comme une peine suffisante de l'essai manqué. Les doctrines anglaises s'accordent sur ce point avec les doctrines françaises. "Une simple tentative de fuite, dit le *Manuel des prises britannique*, n'est pas en soi une cause de saisie, bienque le commandant ne soit point responsable

des dommages qu'il peut causer au navire ou à son équipage, en empechant par la force cette fuite."

Semblable essai toutefois fournira toujours au belligérant des justes motifs de soupçon; la visite à laquelle il se livra n'en sera que plus minutieuse et telle circonstance qui, a elle seule ne l'aurait pas conduit à saisir, l'y décidera sans doute en devenant plus suspecte après une telle conduite.

Tout autres sont les conséquences d'une résistance par la force. Cette résistance constitue un acte hostile; elle entraine *ipso facto* confiscation du navire et de toute la cargaison.

La violation de neutralité commise par le capitaine compromet le chargement en même temps que le vaisseau; les propriétaires de marchandises neutres inoffensives sont ainsi punis d'avoir trop mal placé leur confiance. S'agit-il de navires neutres naviguant sous convoi, la resistance du navire convoyeur au droite de visite, prétendu par un vaisseau britannique dûment commissioné suffit, nous l'avons vu, à entraîner le capture de tout le convoi. Les Anglais regardent les convois avec une telle défiance et leur témoigent une telle hostilité que la seule découverte, au cours de la visite, d'instructions données à un des vaisseaux convoyés de s'opposer par la force à toute perquisition, suffirait à déterminer la saisie de ce vaisseau, bien qu'aucune résistance n'ait été faite. A plus forte raison, le navire neutre qui naviguerait sous convoi ennemi serait-il, pour ce seul fait, puni de confiscation, car la meilleur raison de sa présence en compagnie si compromettante ne pourrait être que la ferme intention de résister au droit de visite.

La cargaison neutre, au contraire, n'encourt pas toujours confiscation à bord d'un navire ennemi, par cela seul que le navire a fait résistance. Les Anglais distinguent selon que le vaisseau était armé ou non: était-il armé, le propriétaire du chargement neutre ne l'a évidemment choisi que dans le but de soustraire ses biens à la visite, et cela justifie la confiscation; n'était-il pas armé, le neutre a pu lui confier ses biens sans prévoir aucun acte de force; on ne saurait lui reprocher d'avoir voulu s'opposer au droit de visite. Si le navire ennemi a néanmoins résisté comme c'était son droit de le faire dans son propre intérêt et dans l'intérêt de sa cargaison ennemie, cette attitude licite ne doit pas préjudicier aux biens neutres à son bord. (Le droit de la guerre maritime, Nos. 254, 255; p. 223.)

Duboc gives his opinion as follows:

Si le navire suspect refuse de s'arrêter et manifeste par sa manoeuvre l'intention d'échapper à la visite, le croiseur est autorisé à tirer à boulet, sur son avant, mais sans l'atteindre. Si, enfin, cette seconde sommation reste sans effet, le croiseur a le droit de donner la chasse et d'employer la force, sans qu'on puisse le rendre responsable des avaries qui peuvent arriver au navire poursuivi. Si le neutre refuse *par la force* et engage un combat

à la suite duquel il est reduit, le navire est considéré comme de bonne prise. Nouse partageons à cet égard l'avis de Hautefeuille qui assimile la résistance à l'exercise de la visite au fait de porter de la contrebande de guerre et de violer la neutralité. On ne peut nier dans tous les cas qu'il s'agit là d'une violation flagrante de droit international; et nous ajouterons que celui qui se met sciemment dans un cas semblable le fait à ses risques et périls.

Nous sommes, sur ce point, d'accord avec le jurisprudence anglaise, avec cette restriction que le navire doit être confisqué ainsi que la cargaison dans le seul cas où elle appartient au capitaine ou à l'armateur. Dans le cas contraire, la cargaison doit être rendue. Si le navire qui a tenté d'échapper à la visite est ennemi, chargé de marchandise neutre, celle-ci doit être également rendue. Nous ne saurions aller aussi loin que le juge de l'Amirauté William Scott (Lord Stowell) qui, dans le cas d'un navire neutre chargé par des neutres, *confisque le tout.* Il est évident que, seuls, le capitaine et l'armateur qu'il représente ont violé le droit, et que les chargeurs n'en sauraient rendus responsables. (Le droit de visite, p. 49.)

Hall states that—

The right of capture on the ground of resistance to visit, and that of subsequent confiscation, flow necessarily from the lawfulness of visit, and give rise to no question. If the belligerent when visiting is within the rights possessed by a state in amity with the country to which the neutral ship belongs, the neutral master is guilty of an unprovoked aggression in using force to prevent the visit from being accomplished, and the belligerent may consequently treat him as an enemy and confiscate his ship.

The only point arising out of this cause of seizure which requires to be noticed is the effect of resistance upon cargo when made by the master of the vessel, or upon vessel and cargo together when made by the officer commanding a convoy. The English and American courts, which alone seem to have had an opportunity of deciding in the matter, are agreed in looking upon the resistance of a neutral master as involving goods in the fate of the vessel in which they are loaded, and of an officer in charge as condemning the whole property placed under his protection. "I stand with confidence," said Lord Stowell, "upon all fair principles of reason, upon the distinct authority of Vattel, upon the institutes of other maritime countries, as well as those of our own country, when I venture to lay it down, that by the law of nations as now understood a deliberate and continued resistance to search, on the part of a neutral vessel to a lawful cruiser, is followed by the legal consequences of confiscation."

But the rules accepted in the two countries differ with regard to property placed in charge of a belligerent. Lord Stowell, in administering the law as understood in England, held that the

immunity of neutral goods on board a belligerent merchantman is not affected by the resistance of the master; for while on the one hand he has a full right to save from capture the belligerent property in his charge, on the other the neutral can not be assumed to have calculated or intended that visit should be resisted.

* * * * * * *

The American courts carry their application of the principle that neutral goods in enemy's vessels are free to a further point, and hold that the right of neutrals to carry on their trade in such vessels is not impaired by the fact that the latter are armed. (Hall, International Law, 5th ed., p. 729.)

Neutral property on enemy merchant vessel.—An enemy merchant vessel resisting search and endeavoring to escape, according to the opinion in the case of the *Catharina Elizabeth* and in other cases, is doing what it has a right to do. Of course there would be little question of the condemnation of all property belonging to the owner of the vessel which was on board the vessel resisting the search. The status of the neutral property would still be under the principles of the Declaration of Paris of 1856.

By the Declaration of Paris, regarded as generally binding, and binding by formal accession on the part of most states—

The neutral flag covers enemy's goods, with the exception of contraband of war.

Neutral goods, with the exception of contraband of war, are not liable to capture under any flag.

To the principles of this Declaration it may be safely said that the United States has adhered. Accordingly the neutral goods even on an enemy merchant vessel which had resisted search would not be liable to capture unless such goods were contraband. Ordinarily a war vessel would not wish "for immediate use" goods which would not be under the category of conditional contraband, but in order that goods of this kind be included in the list of conditional contraband they must have a belligerent destination. If the neutral goods on the enemy merchant vessel which resists search have a belligerent

destination the right of preemption as conditional contraband would be operative. The appropriation of the neutral goods would in general have to be based on *need* rather than on *wish* for immediate use, i. e., the wish for luxuries which might be on board and belong to the neutral would not be sufficient ground for appropriation, while the immediate need of flour might be a proper ground.

Preemption.—In the case of the *Haabet* in 1800, Sir William Scott states the general doctrine as to preemption as held at that time:

> The right of taking possession of cargoes of this description, *Commeatus or Provisions*, going to the enemy's port, is no peculiar claim of this country; it belongs generally to belligerent nations. The ancient practice of Europe, or at least of several maritime states of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject only to a right of preemption, that is, to a right of purchase upon a reasonable compensation, to the individual whose property is thus diverted. I have never understood that on the side of the belligerent this claim goes beyond the case of cargoes avowedly bound to the enemy's port, or suspected on just grounds to have a concealed destination of that kind, or that on the side of the neutral the same exact compensation is to be expected which he might have demanded from the enemy in his own port. The enemy may be distressed by famine, and may be driven by his necessities to pay a famine price for the commodity if it gets there; it does not follow that acting upon my rights of war in intercepting such supplies I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established that such a purchase shall be regulated exactly upon the same terms of profit which would have followed the adventure if no such exercise of war had intervened; it is a reasonable indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter and the expenses which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms; but certainly the capturing nation does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs

and damages, in which all loss of possible profit is to be laid upon unjust captors; for these are not unjust captures, but authorized exercises of the rights of war. (2 C. Robinson's Admiralty Report, 174.)

In June, 1864, Great Britain adopted "An act for regulating naval prize of war" (27 and 28 Victoria, cap. 25). This act provides for preemption.

38. Where a Ship of a foreign nation passing the seas laden with naval or victualling stores intended to be carried to a port of any Enemy of Her Majesty is taken and brought into a port of the United Kingdom, and the purchase for the service of Her Majesty of the stores on board the Ship appears to the Lords of the Admiralty expedient without the condemnation thereof in a Prize Court, in that case the Lords of the Admiralty may purchase, on the account or for the service of Her Majesty, all or any of the stores on board the Ship; and the Commissioners of Customs may permit the stores purchased to be entered and landed within any port.

By the United States instructions issued June 20, 1898 (General Order 492), it was declared—

24. The title to property seized as prize changes only by the decision rendered by the prize court. But if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court.

In the same instructions section 4615 of the Revised Statutes is cited to the effect that—

If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey shall be had thereon and an appraisement made by persons as competent and impartial as can be obtained, and their report shall be sent to the court in which proceedings are to be had; and such property, unless appropriated for the use of the Government, shall be sold by the authority of the commanding officer present, and the proceeds deposited with the assistant treasurer of the United States most accessible to such court, and subject to its order in the cause.

Pradier-Fodéré says:

Dans des tout à fait exceptionels, il est permis de prendre possession des provisions du navire *saisi* ou *capturé;* lorsque le croiseur, par exemple, a besoin de houille ou manque de vivres, et qu'il en trouve à bord du navire saisi, il est bien naturel qu'il s'en empare, mais on exige théoriquement que ce soit par préemp-

tion, et en prenant des mesures propres à offrir des garanties suffisantes contre des abus toujours possibles de la part de ceux qui, disposant de la force, ne sont que trop portés a s'en servir sans modération. (8 Droit International Public, p. 653, § 3185.)

Perels maintains that an attempt to justify seizure, on payment of indemnity, of articles which may be of use for war, such as provisions, on the ground of preemption is an arbitrary extension of belligerent rights and should be absolutely discountenanced.

In case of urgent need, however, the belligerent may take on payment of ample indemnity neutral goods, particularly provisions bound toward the enemy state, even when their military destination is not clear. This is not based on the right of preemption, but flows from the right of self-preservation in case of urgent necessity, and is of the same character as the right of angary. (Öffentliche Seerecht der Gegenwart, sec. 46.)

The articles for the government of the Navy provide for the removal of goods from a prize under certain circumstances:

16. No person in the Navy shall take out of a prize, or vessel seized as a prize, any money, plate, goods, or any part of her equipment, unless it be for the better preservation thereof or unless such articles are absolutely needed for the use of any of the vessels or armed forces of the United States, before the same are adjudged lawful prize by a competent court; but the whole, without fraud, concealment, or embezzlement, shall be brought in, in order that judgment may be passed thereupon; and every person who offends against this article shall be punished as a court-martial may direct.

The appropriation of neutral goods which the commander of the war vessel wishes which are on an enemy merchant vessel not bound for any enemy destination would be an act of entirely different character from the appropriation of goods under similar conditions which were of the nature of conditional contraband and bound for an enemy destination. If the enemy merchant vessel which resists search is bound for a neutral port the right of preemption does not apply. The neutral goods on this enemy merchant vessel when not having enemy destination are simply liable to the inconvenience

consequent upon the sending in of the vessel for adjudication. The mere wish of the captors of the vessel that they may have these goods for immediate use is not sufficient to justify appropriation even if full compensation is made. Of course there is no opposition from the point of view of international law to the purchase by agreement in advance of any such goods, but the appropriation of innocent goods of a neutral is an act liable to give rise to serious complications.

Even in case of war on land, where the belligerent is in full control and exercising jurisdiction over property, the rules in regard to appropriation are strict.

Preemption in war on land.—In case of war on land it was provided at The Hague in 1899 that—

ART. 52. Neither requisition in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.

These requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged. (Law and Customs of War on Land.)

American practice and opinion.—The American practice and opinion has generally been to allow the appropriation or destruction of neutral property within belligerent jurisdiction only on the ground of military necessity, and even then full compensation must be paid and, if possible, agreed upon in advance.

Where innocent neutral goods are in an enemy merchant vessel bound for a neutral port no guilt can attach to the goods because the merchant vessel attempts to escape. Of course the goods would be liable to the consequences if it should be necessary to fire upon the enemy merchant vessel to bring her to. If the merchant vessel should be sunk in this way there would be no claim on the part of the neutral owner against the United States. These goods would be liable, as other goods within the

actual area of hostilities, to damages incident to legitimate military operations.

The goods are innocent when the capture as stated in Situation IV is made and the reason for the appropriation is simply the captain's *wish* for such goods for immediate use. As a general principle this *wish* would not be a sufficient ground for appropriation of the goods. A desire or wish, however ardent, is not the justification which sanctions the taking of innocent neutral property in the time of war any more than the taking of the same property in the time of peace. Unless the property under consideration is tainted with hostile character, it is as free as under a neutral flag though subject to the inconvenience due to the capture and adjudication of the vessel. The only justification for its appropriation, therefore, would not be the captain's *wish* for the property for immediate use, but a *military necessity* such as to demand its appropriation. The Articles for the Government of the Navy are in entire accord with the best practice in requiring *absolute need for the use of any of the vessels or armed forces of the United States* as justification for the removal of neutral goods from a seized vessel in advance of the decision of the prize court. Military necessity which would justify the appropriation of neutral goods must be of the nature of imperative need for self-preservation; mere convenience or desire is not a sufficient ground for such seizure or appropriation. Full compensation must in all cases be regarded as a sequence of such appropriation.

Conclusion.—The goods should not be treated as hostile.

The goods should not be taken from the vessel except for better preservation thereof or unless such articles are absolutely needed for the use of any of the vessels or armed forces of the United States. The appropriation of innocent neutral goods must be justified by military necessity, not by mere wish or desire.

Situation V.

War exists between the United States and State X. Neutral merchant vessels bound for a fortified port of State X and loaded for the most part with contraband are overtaken on the high seas by vessels of the United States Navy.

Some of these neutral merchant vessels are unseaworthy, some are overtaken at points too far from a prize court to make it advantageous to send the vessels in, others can not be cared for without impeding the action of the United States naval forces, which are in danger of immediate attack, and in other cases prize crews can not be spared to take the captured neutral merchantman to a prize court.

What action may be taken by commanders of vessels of the United States Navy in such cases?

SOLUTION.

(*a*) If the contraband cargo and the seized neutral vessel have different owners, the contraband cargo, after proper survey, appraisal, and inventory, and with consent of the master, if in accordance with treaty provisions, may be taken, and the vessel, if guilty only of the carriage of contraband, should be dismissed and the papers relating to the whole transaction should be forwarded to the prize court.

(*b*) If the master does not consent the vessel and cargo are liable to the usual penalties for contraband trade.

(*c*) If the neutral vessel and contraband cargo belong to the same owner the contraband cargo may be treated as in (*a*). The vessel, however, should, if possible, be sent to a prize court for adjudication, otherwise the vessel should be dismissed.

(*d*) Destruction, on account of military necessity, of a neutral vessel guilty only of the carriage of contraband entitles the owner to fullest compensation. Before destruction all persons and papers should be placed in safety.

NOTES ON SITUATION V.

Discussion in 1905.—Topic IV, considered by the Naval War College in 1905, was as follows:

Should the destruction of captured vessels be allowed before adjudication by a prize court? If so, under what condition?

The conclusion of the Conference was as follows:

Enemy vessels.—If there are controlling reasons why enemy vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold, and if this can not be done they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered.

Neutral vessels.—If a seized neutral vessel can not for any reason be brought into port for adjudication, it should be dismissed. (Naval War College, International Law Topics and Discussions, 1905, pp. 62–76.)

The discussion in 1905 was more particularly concerned with the conditions under which enemy vessels might be destroyed.

In 1905 it was said:

The destruction of a neutral ship must be clearly distinguished from the destruction of a belligerent ship even under the principles at present generally accepted. If the belligerent's vessel is good prize it may be lost to that belligerent from the time when his opponent captures it. This is not always necessarily the case, because it may be recaptured or a court for some reason may not condemn the vessel. "Quarter-deck courts" should be avoided, except in extreme instances, even in deciding on the destruction of enemy vessels. Such vessels may have neutral cargo, which may be in no way involved in the hostilities. The principle of the Declaration of Paris that "neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag" may be involved in such a manner as to make great caution necessary in destroying vessels of the enemy before adjudication.

Much greater care should be taken before destroying a neutral vessel itself. (Ibid, p. 72.)

In Topic IV, 1905, attention was particularly directed to the conditions under which enemy vessels might be

destroyed. In Situation V of 1907 it is the purpose to give somewhat more consideration to the treatment of cargoes on neutral vessels and to the treatment of neutral vessels themselves.

Many grounds have been put forward as sufficient for the destruction of private vessels that have been seized in time of war. From the phraseology of the rules that have been drawn up from time to time it would seem that it had not entered the minds of some writers that a neutral vessel could under any circumstances be destroyed before condemnation by a prize court.

Restriction on movements of vessels with prize.—When prizes could be brought into neutral ports the question of destruction was not particularly pressing, as sale in a neutral port was a possibility, or in case of unseaworthiness refitting could be undertaken there.

Most neutral states at the present time forbid the entrance to their ports of war vessels of the belligerents with prize. The following are examples of the prohibitions:

An Italian royal decree of June 16, 1895, says:

ART. 12. Foreign ships of war and merchantmen armed for cruising are forbidden to bring prizes into, or to arrest and search vessels in, the territorial sea or in the sea adjacent to the Italian islands, as well as to commit other acts which constitute an offense to the rights of state sovereignty.

Great Britain in 1898 and in 1904 prohibited the entrance of prize.

Armed ships of either belligerent are interdicted from carrying prizes made by them into the ports, harbors, roadsteads, or waters of the United Kingdom, the Isle of Man, the Channel Islands, or any of Her Majesty's colonies or possessions abroad.

France allowed the entrance of war vessels with prize in 1898 and in 1904.

The Government decides in addition that no ship of war of either belligerent will be permitted to enter and to remain with her prizes in the harbors and anchorages of France, its colonies

and protectorates, for more than twenty-four hours, except in the case of forced delay or justifiable necessity.

No sale of objects gained from prizes shall take place in the said harbors and anchorages.

Regulations as to destruction of seized vessels.—The regulations of different states in regard to the destruction of seized vessels vary. The British regulations are rather more definite than those of most other states.

In regard to destruction of captured vessels the British Admiralty Manual of Prize Law of 1888 makes clear distinction between the treatment of neutral and of enemy vessels.

303. In either of the following cases:

(1) If the Surveying Officers report the Vessel not to be in a condition to be sent into any port for Adjudication; or

(2) If the Commander is unable to spare a Prize Crew to navigate the Vessel to Port of Adjudication, the Commander should release the Vessel and Cargo without ransom, unless there is clear proof that she belongs to the Enemy.

304. But if in either of these cases there be clear proof that the Vessel belongs to the Enemy, the Commander should remove her Crew and Papers, and, if possible, her Cargo, and then destroy the Vessel. The Crew and the Cargo (if saved) should then be forwarded to a proper Port of Adjudication in charge of a Prize Officer, together with the Vessel's Papers and the necessary Affidavits. Amongst the Affidavits should be one, to be made by the Prize Officer, exhibiting the evidence that the Vessel belonged to the Enemy, and the facts which rendered it impracticable to send her in for Adjudication. (Page 86.)

The French *Instructions Complémentaires* of 1870 grant great freedom in the treatment of neutral property.

Art. 20. Si une circonstance majeure forçait un croiseur à détruire une prise, parce que sa conservation compromettrait sa sécurité ou le succès de ses opérations, il devrait avoir soin de conserver tous les papiers du bord et autres éléments nécessaires pour permettre le jugement de la prise et l'établissement des indemnités à attribuer aux neutres dont la propriété non confiscable aurait été détruite. On ne doit user de ce droit de destruction qu'avec la plus grande réserve.

The instructions issued by the United States in 1898 (General Order, No. 492) make no distinction between neutral and enemy vessels seized as prize.

28. If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this can not be done they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But, in all such cases, all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered.

The Russian Prize Regulations of March 25, 1895, make no distinction in the treatment of detained vessels, whether enemy or neutral vessels.

21. In extraordinary cases, when the preservation of a detained vessel proves impossible in consequence of its bad condition or extremely small value (sic), the danger of its recapture by the enemy, or the considerable distance or blockade of the ports, as well as of danger threatening the detaining vessel or the success of its operations, the naval commander is permitted, on his personal responsibility, to burn or sink the detained vessel after having first taken all the people off it, and as far as possible the cargo on board, and also after having taken measures for preserving the documents and other objects on board, and which might prove essential in elucidating matters when the case is examined according to the method prescribed for prize cases. (U. S. Foreign Relations, 1904, p. 738.)

The Japanese regulations issued during the Chino-Japanese war of 1894 provide:

ARTICLE 18. After detention, the commander should as soon as possible himself bring the vessel to the port where the prize court is, or the port nearest the prize court.

If the state of things renders it necessary, he may order the officer who secured the vessel (art. 14) or another officer to embark on board and bring the vessel to the above-named port.

ARTICLE 19. If the quantity of provisions, the state of the weather, or other circumstances render it necessary, the commander may call at the nearest port. When the circumstances admit, he should as soon as possible go to the port stated in article 18.

ARTICLE 20. When the commander finds that the detained vessel is unfit to be sent to the port stated in article 18, or when the commander is not able to send a crew to the vessel for the purpose of bringing her to the above-named port, or when he finds the cargo is unfit to be sent to that port, the commander may bring the vessel to the nearest port to where he is, and may act as the state of things permits him.

In this case the commander should cause a survey thereof to be made by the officers of his ship the best qualified for the duty, and the surveying officers should report in writing the details of the matter to the commander, and the commander should forward the report to the prize court.

When the commander causes the cargo to be sold, the affidavit may be in Form No. 4. In other cases, in which the detained vessel is brought to the nearest port, the affidavit may be in Form No. 5.

In the above-mentioned case, if the vessel is not an enemy's vessel, the commander should release the vessel after confiscation of the contraband goods.

ARTICLE 21. The sale may be made in any neutral port where the local authorities may be willing to allow the sale to take place.

ARTICLE 22. If the enemy's vessels are unfit to be sent to a port, as stated in article 18, the commander should break up the vessels, after taking the crew, the ship's papers, and the cargo, if possible, into his ship. The crew, the ship's papers, and the cargo should be sent to a port, as stated in article 18. (Takahashi, International Law During the Chino-Japanese War, p. 183.)

The Japanese regulations of March 7, 1904, are much more general in character.

ARTICLE XCI. In the following cases, and when it is unavoidable, the captain of the man-of-war may destroy a captured vessel, or dispose of her according to the exigency of the occasion. But before so destroying or disposing of her he shall transship all persons on board and, as far as possible, the cargo also, and shall preserve the ship's papers and all other documents required for judicial examination:

1. When the captured vessel is in very bad condition and can not be navigated on account of the heavy sea.

2. When there is apprehension that the vessel may be recaptured by the enemy.

3. When the man-of-war can not man the prize without so reducing her own complement as to endanger her safety.

ARTICLE XCII. In the cases of the above article the captain of the man-of-war shall direct the prize officer to prepare a certificate stating the circumstances of inability to send in the prize and the details of her disposal, and to send it to the nearest prize court, together with persons and cargo removed from the vessel, the ship's papers, and all other documents required for judicial examination.

These regulations have not received the same interpretation in all cases.

Oppenheim says:

Japan, which according to article 20 of her prize law of 1894 ordered her captors to release neutral prizes after confiscation of their contraband goods, in case the vessels can not be brought into a port, altered her attitude in 1904, and allowed in certain cases the destruction of neutral prizes. (2 International Law, p. 471, sec. 431.)

Of the above statement J. B. Moore says:

A close scrutiny of article 20 of the Japanese prize law of 1894 seems scarcely to bear out this statement. The article does not in terms embrace vessels not brought in, but refers to cases in which the prize was, in conformity with article 18, brought in, if not to the port where the prize court sits, then, in conformity with article 19, to the port nearest the place of capture; and in this relation it provides: "In the above-mentioned cases, if the vessel is not an enemy's vessel, the commander should release the vessel after confiscation of the contraband goods."

A stronger implication, to the effect stated by Oppenheim, might have been drawn from article 22 of the prize law of 1894, which reads: "If the enemy's vessels are unfit to be sent to a port as stated in article 18, the commander should break up the vessels, after taking the crew, the ship's papers, and the cargo, if possible into his ship. The crew, the ship's papers, and the cargo should be sent to a port as stated in article 18." (7 Moore, International Law Digest, p. 524.)

The Instructions to Blockading Vessels and Cruisers issued by the United States June 20, 1898 (General Order No. 492), states:

24. The title to property seized as prize changes only by the decision rendered by the prize court. But, if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court.

British cases and opinions.—Professor Holland, in a letter to the *Times*, London, referring to the Russian rules, also refers to several cases.

The *Actaeon*, an American ship, in 1814, under British license, was destroyed by the British war ship *La Hogue*. The captain of *La Hogue* could not spare a prize crew to send the *Actaeon* to port and did not deem it wise to allow the *Actaeon* to proceed, as she might disclose the position and strength of his force. He therefore destroyed the

Actaeon with her cargo. The court decided that while the action of the British captain might be meritorious as toward his own Government, it might not properly entail loss upon the innocent owner.

Lastly, it has been said that Captain Capel could not spare men from his own ship to carry the captured vessel to a British port, and that he could not suffer her to go into Boston, because she would have furnished important information to the Americans. These are circumstances which may have afforded very good reasons for destroying this vessel, and may have made it a very meritorious act in Captain Capel as far as his own Government is concerned, but they furnish no reason why the American owner should be a sufferer. I do not see that there is anything that can be fairly imputed to the owner as contributing in any degree to the necessity of capturing or destroying his property, and I think, therefore, that he is entitled to receive the fullest compensation from the captor. (2 Dodson's Admiralty Report, p. 48. The *Felicity*, Ibid., p. 381, stated in International Law Topics and Discussion, Naval War College, 1905, p. 63.)

In 1855 Doctor Lushington gave his opinion in the case of the *Leucade*.

The destruction of a vessel under hostile colors is a matter of duty; the court may condemn on proof which would be inadmissible or wholly irregular in the instance of a neutral vessel. It may be justifiable or even praiseworthy in the captors to destroy an enemy's vessel. Indeed, the bringing to adjudication at all of an enemy's vessel is not called for by any respect to the enemy proprietor where there is no neutral property on board. But for totally different considerations, which I need not now enter upon, where a vessel under neutral colors is detained, she has the right to be brought to adjudication according to the regular course of proceeding in the prize court; and it is the very first duty of the captor to bring it in, if it be practicable.

From the performance of this duty the captor can be exonerated only by showing that he was a *bona fide* possessor, and that it was impossible for him to discharge it. No excuse for him as to inconvenience or difficulty can be admitted as between captors and claimants. If the ship be lost, that fact alone is no answer; the captor must show a valid cause for the detention as well as for the loss. If the ship be destroyed for reasons of policy alone, as to maintain a blockade or otherwise, the claimant is entitled to costs and damages. The general rule, therefore, is that if a ship under neutral colors is not brought to a competent court for adjudication, the claimants are, as against the captor, entitled

to costs and damages. Indeed, if a captor doubt his power to bring a neutral vessel to adjudication, it is his duty, under ordinary circumstances, to release her. (Spink's Admiralty Reports, 217.)

These British cases seem to some to admit the right of destruction of neutral vessels under circumstances of grave necessity under penalty not merely of restitution of value but of costs and damages.

In his letter to the London *Times* dated August 1, Professor Holland thus comments upon the practice:

There is no doubt that by the Russian regulations of 1895, article 21, and instructions of 1901, article 40, officers are empowered to destroy their prizes at sea, no distinction being drawn between neutral and enemy property, under such exceptional circumstances as the bad condition or small value of the prize, risk of recapture, distance from a Russian port, danger to the imperial cruiser or to the success of her operations. The instructions of 1901, it may be added, explain that an officer "incurs no responsibility whatever" for so acting if the captured vessel is really liable to confiscation and the special circumstances imperatively demand her destruction. It is fair to say that not dissimilar, though less stringent, instructions were issued by France in 1870 and by the United States in 1898; also that, although the French instructions expressly contemplate "l'établissement des indemnités à attribuer aux neutres," a French prize court in 1870 refused compensation to neutral owners for the loss of their property on board of enemy ships burnt at sea.

The question, however, remains whether such regulations are in accordance with the rules of international law. The statement of these rules by Lord Stowell, who speaks of them as "clear in principle and established in practice," may, I think, be summarized as follows: An enemy's ship, after her crew has been placed in safety, may be destroyed. Where there is any ground for believing that the ship, or any part of her cargo, is neutral property, such action is justifiable only in cases of "the gravest importance to the captor's own state," after securing the ship's papers and subject to the right of neutral owners to receive full compensation. (*Actaeon*, 2 Dods., 48; *Felicity*, Ib., 381; substantially followed by Dr. Lushington in *Leucade*, Spinks, 221.) It is not the case, as is alleged by the *Novoe Vremya*, that any British regulations "contain the same provisions as the Russian" on this subject. On the contrary, the Admiralty Manual of 1888 allows destruction of enemy vessels only, and goes so far in the direction of liberality as to order the release, without ransom, of a neutral prize which, either from its condition or from lack of a prize crew, can not be sent in for adjudication. The Japanese in-

structions of 1894 permit the destruction of only enemy vessels; and article 50 of the carefully debated "Code des prises" of the Institut de Droit International is to the same effect. It may be worth while to add that the eminent Russian jurist, M. de Martens, in his book on international law, published some 20 years ago, in mentioning that the distance of her ports from the scenes of naval operations often obliges Russia to sink her prizes, so that "ce que les lis maritimes de tous les états considèrent comme un moyen auquel il n'y a lieu de recourir qu'a la denière extrémité, se transformera nécessairement pour nous en règle normale," foresaw that "cette mesure d'un caractère général soulèvera indubitablement contre notre pays un mécontentement universel." (*The Times*, August 6, 1904.)

Lord Landsdowne, in a communication sent to the British ambassador at St. Petersburg, August 10, 1904, protests against the destruction of neutral ships (cited in Topic IV, 1905):

The position, already sufficiently threatening, is aggravated by the assertion on behalf of the Russian Government that the captor of a neutral ship is within his rights if he sinks it, merely for the reason that it is difficult, or impossible, for him to convey it to a national port for adjudication by a prize court. We understand that this right of destroying a prize is claimed in a number of cases; among others, when the conveyance of the prize to a prize court is inconvenient because of the distance of the port to which the vessel should be brought, or when her conveyance to such a port would take too much time or entail too great a consumption of coal. It is, we understand, even asserted that such destruction is justifiable when the captor has not at his disposal a sufficient number of men from whom to provide a crew for the captured vessel. It is unnecessary to point out to your excellency the effects of a consistent application of these principles. They would justify the wholesale destruction of neutral ships taken by a vessel of war at a distance from her own base upon the ground that such prizes had not on board a sufficient amount of coal to carry them to a remote foreign port—an amount of coal with which such ships would probably in no circumstances have been supplied. They would similarly justify the destruction of every neutral ship taken by a belligerent vessel which started on her voyage with a crew sufficient for her own requirements only, and therefore unable to furnish prize crews for her captures. The adoption of such measures by the Russian Government could not fail to occasion a complete paralysis of all neutral commerce.

It appears to His Majesty's Government that no pains should be spared by the Russian Government in order to put an end without delay to a condition of things so detrimental to the com-

merce of this country, so contrary to acknowledged principles of international law and so intolerable to all neutrals. You should explain to the Russian Government that His Majesty's Government does not dispute the right of a belligerent to take adequate precautions for the purpose of preventing contraband of war, in the hitherto accepted sense of the words, from reaching the enemy; but they object to, and can not acquiesce in, the introduction of a new doctrine under which the well-understood distinction between conditional and unconditional contraband is altogether ignored, and under which, moreover on the discovery of articles alleged to be contraband, the ship carrying them is, without trial and in spite of her neutrality, subjected to penalties which are reluctantly enforced even against an enemy's ship. (Parliamentary Papers, Russia, No. 1 (1905), p. 12.)

The Knight Commander case.—The sinking of the *Knight Commander* in 1904 during the Russo-Japanese war has attracted general attention and caused much discussion. The *Knight Commander* was a British steamer and was captured by a Russian cruiser and sunk before adjudication by a prize court.

Attitude of the United States.—In regard to the rumored sinking of the *Knight Commander* during the Russo-Japanese war in 1904, the United States cabled its representatives in Russia:

DEPARTMENT OF STATE,
Washington, July 30, 1904.

(Mr. Loomis instructs Mr. Eddy to call the attention of the minister of foreign affairs to the treaty of 1854, and that, as legitimate commerce is carried on by American ships with Japanese ports and the Far East, the United States Government, considering the above treaty and section 1, article 5, of the Russian proclamation of rules of conduct in the war between Russia and Japan, expects, and should the contingency arise, shall claim rights under that treaty or international law.

As it is represented that the *Knight Commander* was under American charter and was carrying American property, instructs him to inquire whether that vessel was sunk by the commander who made the seizure, and to inform the Russian Government that if such is the case the Government of the United States would view with the gravest concern the application of similar treatment to American vessels and cargoes, and that this Government reserves all rights of security, regular treatment, and reparation for American cargo on board the *Knight Commander* and in any seizure of American vessels.) (U. S. Foreign Relations, 1904, p. 734.)

Decision of Vladivostok prize court.—The sinking of the *Knight Commander* during the Russo-Japanese war in 1904 was considered by the Russian prize court at Vladivostok, which rendered its decision on August 3–16, 1904. The decision gives the following statements:

The facts of the case are as follows: On July 11/24, about 6 a. m., a separate detachment of cruisers of the Pacific Ocean squadron under command of Rear-Admiral Jessen, consisting of cruisers *Rossia* (flagship), *Gromoboi* and *Rurik*, while in latitude 34° 21′ N., longitude 138° 53′.5 E., to southwest of entrance to Gulf of Tokio, perceived a merchant steamer. *Rossia* gave chase, and when within 15 or 20 cables hoisted signal "stop," and then sent, one after another, two blank shots, then two projectiles under her bow as steamer continued on her course at full speed for entrance of Tokio Gulf. The steamer then stopped and hoisted British commercial flag. By order of commander of detachment, *Rossia* hoisted signal "Master come on board with papers," but as this order was not obeyed, a party headed by Lieutenant Favrishenko and Sub-Lieutenant Aminoff was sent aboard to examine steamer's papers and cargo. Examination proved that J. R. Durant was master, that she was on voyage to Japan with cargo consisting of railway material, bridge material, machinery, and various articles. The master of the steamer was not able to present any documents of his cargo, but examination of the holds showed that they were filled with contraband exclusively, the other articles constituting an unimportant portion. After examination the officers returned to the cruiser, bringing the master and papers along. Having inquired of the master why there were no bills of lading amongst the papers, and learning there was coal for four days only, Rear-Admiral Jessen informed the master that the steamer was subject to confiscation, and as she had not sufficient coal to take her into a Russian port, she would be destroyed. Half an hour was given for removal of the crew. After removal of crew she was sunk by explosion of cartridges at 9.15 a. m. On return of cruiser division to Vladivostok, the matter of sinking of steamer was submitted to the prize court. Examination of master's papers showed that steamer was British register, built in Yarrow in 1890, of 9,620 displacement, 4,305 and 2,716 registered tonnage and speed of 11 knots. Her registry was from Liverpool, No. 97801, and steamer belonged to Robert Low Greenshields, of Liverpool. From entries in log and testimony of master it was learned that until December, 1903, the vessel made voyages between Calcutta and other East Indian ports. In December she was chartered by the Austrian Lloyd for a trip to Trieste and Venice. From Venice steamer chartered by an Austrian firm in Trieste to carry coal for machinery and private cargo to Mes-

sina, then from Palermo to load 25,000 cases of lemons and general cargo for New York, where the charter lapsed. In New York the steamer was not chartered by anyone, but gradually received various cargo, and was sent by orders of the agents of the ship's owner to Singapore, Manila, Shanghai, Yokohama, and Kobe, where this voyage was to end. In regard to the cargo for which the master, Durant, presented no bills of lading or even manifest, the court could only form a notion of that portion addressed to Japanese ports of Yokohama and Kobe, which was in the steamer at time of capture. Ship's papers being missing, the court took the evidence of the two boarding officers, Lieutenant Favrishenko and Baron Aminoff, in two private memorandum books, presented by the latter. From the data, when carefully confronted one side with the other, we may conclude that the cargo at moment of seizure of ship consisted of the following articles: Rails, bridge materials, various railway material, steel, steel sheets, nails, wire, pipes, wheels, tar, acids, shovels, and a small quantity of assorted cargo consisting of paint, clothing, leather, sailcloth, tin, hardware, wood, and small articles, as ink, perfumery, soap. Thus it may be considered as fully proven that the *Knight Commander* was arrested by the Russian cruisers while carrying contraband of war into the enemy's ports.

After examination of the evidence the court reached the following conclusion:

Therefore the court feels convinced that the following is indubitably proven.

(1) The fact that the owner of the steamer *Knight Commander* having performed illegal acts, directed to make more effective the efforts of our antagonist by carrying to him at Chemulpo, the theater of war directly, articles of military contraband.

(2) The suppression by the master of said steamer of an entire file of important documents relating to his vessel and to her cargo as well as his undoubted knowledge that he was conveying articles of military contraband to the enemy; and

(3) The presence on said steamship at the moment of being seized of military contraband in quantity indubitably exceeding one-half of her entire cargo.

On these grounds, and taking into consideration the actual facts of the present case as provided for by articles 5, 8, 13, of the statutes of naval prizes, the prize court finds:

(1) That the *Knight Commander* was arrested in a legal manner in compliance with the rules enacted in articles 2, 3, 15–17 of the statutes; and

(2) That the said steamer having been caught conveying military contraband to the enemy in quantity exceeding one-half of the cargo, as well as the mentioned contraband, appear to be legal

prizes, and decrees to adjudge the steamer *Knight Commander* and the contraband cargo that was in her at the time of her seizure as subject to confiscation as legal prizes.

Appeal from the Vladivostok decision.—In the appeal from the decision of the Vladivostok court to the higher prize court, the attorney for the owners of the steamer and for the owners of the sunken cargo concludes, on review of the evidence, that—

> Therefore the only action that should have been taken in this case was to arrest the ship and bring her into the nearest Russian port to land the contraband, but in no case to sink the steamer. Under the circumstances when the steamer was arrested, taking her into a Russian port presented scarcely any difficulty whatever; for (1) because there was on the steamer, as seen from the record, about 120 tons of coal, which, allowing for a ten-knot speed, would have been sufficient for four days, distance of nearly 1,000 miles. Whereas the distance to the nearest Russian port, Kersakovsk or Saghalin, from Yokohama is considered 750 miles, and (2) though the vessel was stopped 15 miles off the entrance of the Gulf of Tokio, no enemy was seen nor was there any evidence of his proximity, whereas these circumstances exactly were deemed extraordinary and the steamer was sunk. The prize court in its decision with reference to the quantity of the cargo was guided by the same data as the naval authority, whereas had they acted in conformity with article 71, statutes on prizes, by virtue of which in similar cases the shipper must be summoned by publication, in such case most probably there would have been at the disposal of the court a sufficient number of proofs of the faulty character of the decision regarding the quantity of cargo adjudged military contraband.
>
> Relying upon all the above statements, I have the honor to ask the highest prize court to revoke the decision of the Vladivostok prize court as incorrect, and to decree that the sinking of the *Knight Commander* was unjustifiable, and that the owners both of the steamer and cargo are entitled to receive remuneration for the sinking of the one and the other.

Decision on the appeal.—The following telegram explains the action upon the appeal in the case of the *Knight Commander:*

> AMERICAN EMBASSY,
> *St. Petersburg, December 5, 1905.*
>
> (Mr. Eddy reports that the decision in the case of the *Knight Commander*, rendered on Saturday, maintains the finding of the Vladivostok prize court in regard to condemnation of the vessel and cargo, that the protest of Mr. Berline concerning neutral

goods was allowed, and that that matter was referred to the Libau prize court for revision under article 88, naval prize regulations.) (U. S. Foreign Relations, 1905, p. 754.)

The article 88 above referred to is:

88. Matters concerning indemnification for losses arising as a result of the detention, destruction, perishing, or injury of merchant vessels and cargoes are transacted in port prize courts, and are begun only at the instance of parties who have sustained losses or their agents. The rights of parties in the matters mentioned are enjoyed by the persons who have suffered loss, or their agents, and by the judge-advocate as representative of the interests of the Government. (U. S. Foreign Relations, 1904, p. 746.)

Review of the case.—There is no contention that the condition of the *Knight Commander* was bad, that its value was extremely small, that there was danger of recapture, or that the distance from a port was great, though it was maintained that there was coal enough only for four days, and on this ground the vessel was destroyed. As the court decision says:

Having inquired of the master why there were no bills of lading among the papers, and learning there was aboard coal for four days only, Rear-Admiral Jessen informed the master that the steamer was subject to confiscation, and as she had not sufficient coal to take her into a Russian port, she would be destroyed. Half an hour was given for removal of the crew. After removal of the crew she was sunk by explosion of cartridges at 9.15 a. m.

The naval officer thus constituted a "quarter-deck prize court" decided the neutral vessels liable to confiscation and destroyed vessel and cargo.

In the case of the *Knight Commander* the prize court at Vladivostok was largely military in character, made up as follows: "Major-General Knipper, chairman; Captain (second rank) Simonoff, Lieutenant-Colonel Egerman, Public Councillor Stein, Collegiate Secretary Cheborenko, Procurator Titular Councillor Lazarevsky, Collegiate Secretary Engelhardt, secretary."

Reciting certain facts in regard to cargo and voyage, this court says, "Thus it may be considered as fully proven that the *Knight Commander* was arrested by the Russian cruisers while carrying contraband of war into the enemy's ports."

It may be noted that the articles mentioned, such as rails, railway material, wire, acids, wheels, clothing, hardware, perfumery, soap, etc., are generally regarded as contraband only when destined for the enemy's military or naval use. The simple destination of such articles of conditional contraband nature to the ports of an enemy does not necessarily make them liable to capture.

The absence, loss, or destruction of certain of the proper ship's papers which was set forth before the court is not a ground for destruction, but may be ground for seizure of a vessel.

The destination was not proven beyond a doubt, though supposed for a part of the cargo to be Chemulpo, which, though in Korea, the Russian report names as "the theater of war."

That the owner of the vessel was involved in the transaction other than as a carrier is not affirmed.

The amount of goods of various classes is admittedly in doubt. The nature of the cargo was bulky and of such character as to make it impossible for the visiting party of two or three to make sure it was conditional contraband.

In Attorney Bagenoff's appeal from the decision of the Vladivostok court it is claimed that the trial was illegal because—

1. The procedure was irregular and the evidence insufficient and *ex parte*.

2. The absence of certain of the ship's papers would, according to Russian instructions 18 and 20, permit only search and detention of the vessel.

3. The examination of the cargo was superficial and indefinite by looking through the hatchways into the holds, and the testimony of the examining officers was not in agreement.

Professor Woolsey's opinion.—In the discussion of the case of the *Knight Commander*, Professor Woolsey, in an article appearing since this Situation was prepared, says:

> These are the considerations involved:
> (1) The injustice of penalizing a ship not shown to be guilty.

(2) The insufficiency of an *ex parte* examination of cargo at sea.

(3) Validity of excuses for destruction.

(4) The doctrine of conditional contraband; its application to this cargo.

(5) Is destruction ever permissible?

(6) Is destruction lawful subject to compensation?

* * * * * * *

So far as I am aware the injustice of destruction attaching as a penalty to the neutral ship, even granting that it is carrying contraband, has not been sufficiently emphasized in the *Knight Commander* case.

The argument is this: To condemn a ship carrying contraband it must be shown that it belonged to the owner of the contraband or that the contraband formed so large a part of the cargo as to prove complicity. This is an intricate business of a highly judicial nature, demanding the production of papers and examination of witnesses. It will be later shown what grave doubt existed as to the really contraband character of the cargo in question. But, laying this aside, the case in point shows us a penalty, namely, the loss of the ship, which according to the accepted rules governing contraband would not have been inflicted by any well-regulated prize court, unless the owner of the ship was shown to be the owner of the cargo as well, as to which there is no proof that the searching officer made inquiry. Thus we find the case to involve an enlargement of the accepted penalties for carrying contraband.

2. The vast difference between the cursory *ex parte* judgment upon all the facts in a ship's case and the judicial examination of the same is also to be noted as a sound reason against the practice we are considering. In port the cargo can be landed, its character ascertained, its destination learned, and witnesses summoned in proof of all, beside that evidence which the ship's papers give. This trial, before a court trained to judge the credibility of evidence, if properly conducted, creates so strong a presumption of guilt or innocence that few governments will venture to challenge the verdict. It must be admitted that the prize court of first instance sitting at Vladivostok seems to have been scarcely a judicial body it seems to have existed for condemnation only.

After discussing other questions raised by the destruction of the *Knight Commander*, Professor Woolsey refers to the distinction between "compensation paid for a destroyed neutral ship as implying a penalty for an unlawful act and compensation interpreted as the price to

be paid by the belligerent for destruction as a military necessity acting within its rights." He says:

With this distinction clearly in mind and the *jus angariae* to justify destruction on account of the military necessity alluded to by Professor Holland, it is contended that the only reason for exceptions to the rule disappears, and that we are justified in laying down as probably the usage of to-day—with the sole exception of Russia—that neutral ships which can not be taken before a court for trial must be released. If military necessity demands, they may be appropriated or destroyed subject to full payment.

In defense of this rule are the following considerations: This is substantially the usage of to-day except in Russia. This is the opinion almost unanimous of British and American writers. Continental publicists, while not unanimous, are fairly favorable to this rule. Neutral states demand it as a reasonable measure, in their interest. It is a logical rule, because otherwise you are enlarging the penalty of carrying contraband, making ship liable with goods, and conferring improper judicial authority upon a naval officer not trained for it. If this is not the rule, yet it is a reasonable rule, and as it is the fashion now-a-days to say, the next Hague Conference should make it a rule. (16 Yale Law Journal, p. 567 ff.)

Later Russian regulations.—The protests in regard to the sinking of the *Knight Commander* led to the issue of new orders.

The Russian instructions of August 5, 1905, leave some doubt by making a distinction between " direct necessity " and " emergency."

Russian vessels were not to sink neutral merchantmen with contraband on board in the future, except in case of direct necessity, but in case of emergency to send prizes into neutral ports.

Case of the Kow-Shing.—On July 25, 1894, the *Kow-Shing*, a British vessel, engaged in Chinese transport service in the Chino-Japanese war, and having on board about 1,100 troops, was stopped and ordered to follow a Japanese war ship to port. The Chinese on board the transport refused to allow this. The Japanese war ship sunk the *Kow-Shing*. The action of the Japanese war ship has been generally supported as an act of war, the transport being engaged in the military service

of the enemy. (Takahashi, International Law during the Chino-Japanese War, p. 24.)

Professor Holland's opinion.—Professor Holland, in a letter to the London Times, says of the sinking of the *Kow-Shing:*

The *Kow-Shing*, therefore, before the first torpedo was fired, was, and knew that she was, a neutral ship engaged in the transport service of a belligerent. (Her flying the British flag, whether as a *ruse de guerre* or otherwise, is wholly immaterial.) Her liabilities as such a ship were twofold:

1. Regarded as an isolated vessel, she was liable to be stopped, visited, and taken in for adjudication by a Japanese prize court. If, as was the fact, it was practically impossible for a Japanese prize crew to be placed on board of her, the Japanese commander was within his right in using any amount of force necessary to compel her to obey his orders.

2. As one of a fleet of transports and men-of-war engaged in carrying reinforcements to the Chinese troops on the mainland, the *Kow-Shing* was clearly part of a hostile expedition, or one which might be treated as hostile, which the Japanese were entitled, by the use of all needful force, to prevent from reaching its destination. The force employed seems not to have been in excess of what might lawfully be used, either for arrest of an enemy's neutral transport or for barring the progress of a hostile expedition. The rescued officers also having been set at liberty in due course, I am unable to see that any violation of the rights of neutrals has occurred. No apology is due to our Government, nor have the owners of the *Kow-Shing* or the relatives of her European officers who may have been lost any claim for compensation. I have said nothing about the violation by the Japanese of the usages of civilized warfare (not of the Geneva Convention, which has no bearing upon the question) which would be involved by their having fired upon the Chinese troops in the water; not only because the evidence upon this point is as yet insufficient, but also because the grievance, if established, would affect only the rights of the belligerents *inter se;* not the rights of neutrals, with which alone this letter is concerned. I have also confined my observations to the legal aspects of the question, leaving to others to test the conduct of the Japanese commander by the rules of chivalrous dealing or of humanity.

Your obedient servant,

T. E. HOLLAND.

ATHENÆUM CLUB, *August 6.*

(Reprinted in Takahashi, International Law during the Chino-Japanese War, p. 41.)

United States opinion as to court and prize.—In 1851 the case of Jecker *v.* Montgomery in the Supreme Court of the United States gave rise to several questions.

This case arises upon the capture of the ship *Admittance* during the late war with Mexico by the United States sloop of war *Portsmouth*, commanded by Captain Montgomery.

The *Admittance* was an American vessel, and after war was declared sailed from New Orleans, with a valuable cargo, shipped at that place. She cleared out for Honolulu, in the Sandwich Islands, and was found by the *Portsmouth* at Saint Jose, on the coast of California, trading, as it was alleged, with the enemy.

Before this capture was made, a prize court had been established at Monterey, in California, by the military officer exercising the functions of governor of that province, which had been taken possession of by the American forces. A chaplain belonging to one of the ships of war on that station was appointed alcalde of Monterey, and authorized to exercise admiralty jurisdiction in cases of capture. The court was established at the request of Commodore Biddle, the naval commander on that station, and sanctioned by the President of the United States, upon the ground that prize crews could not be spared from the squadron to bring captured vessels into a port of the United States, and the officers of the squadron were ordered to carry their prizes to Monterey and libel them for condemnation in the court above mentioned, instead of sending them to the United States.

In pursuance of this order the *Admittance* was carried to Monterey and condemned by the court as lawful prize, and the vessel and cargo sold under this sentence. The seizure at Saint Jose was made on the 7th of April, 1847, and the ship and cargo condemned on the 1st of June, in the same year.

* * * * * * *

All captures *jure belli* are for the benefit of the sovereign under whose authority they are made, and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question, and under the Constitution of the United States the judicial power of the General Government is vested in one Supreme Court and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States, and neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States or of individuals in prize cases, nor to administer the laws of nations.

The courts established or sanctioned in Mexico during the war by the commanders of the American forces were nothing more

than the agents of the military power, to assist it in preserving order in the conquered territory and to protect the inhabitants in their property and persons while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize, and the sentence of condemnation in the court at Monterey is a nullity, and can have no effect upon the rights of any party.

* * * * * * *

As a general rule it is the duty of the captor to bring it within the jurisdiction of a prize court of the nation to which he belongs and to institute proceedings to have it condemned. This is required by the act of Congress in cases of capture of ships of war of the United States; and this act merely enforces the performance of a duty imposed upon the captor by the law of nations, which in all civilized countries secures to the captured a trial in a court of competent jurisdiction before he can finally be deprived of his property.

But there are cases where, from existing circumstances, the captor may be excused from this duty, and may sell or otherwise dispose of the property before condemnation; and where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel, or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States.

But if no sufficient cause is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the court may refuse to adjudicate upon the validity of the capture and award restitution and damages against the captor, although the seizure as prize was originally lawful or made upon probable cause. (13 Howard, U. S. Supreme Court Reports, 498.)

Opinions of writers on destruction of prize.—The opinions of writers upon international law show considerable diversity in statement.

Kent says:

Sometimes circumstances will not permit property captured at sea to be sent into port; and the captor, in such cases, may either destroy it or permit the original owner to ransom it. (Abdy's Kent, International Law, p. 276.)

Kleen enumerates the generally claimed grounds of destruction of seized vessels and comments thereon:

1°. Que le navire soit si délabré, ou marche si mal par suite du mauvais temps, qu'il ne puisse être tenu à flot ou remorqué; 2°. Que, devant l'approche d'un vaisseau de guerre ennemi, le navire puisse être pris par celui-ci, ou empêché de l'éviter ou de lui cacher les opérations; 3°. Que le capteur manque de l'équipage nécessaire pour amariner le navire; 4°. Que le port soit bloqué ou trop éloigné, ou que le navire ait trop peu de valeur pour y être mené; 5°. Que le capteur, étant pressé, n'ait pas de loisir de s'occuper du navire.

Aucun de ces prétextes ne soutient un examen sérieux. Le fait qu'un capteur voit dans les événements naturels, dans des risques pour lui-même, dans le manque d'équipage ou dans d'autres inconvénients pratiques, un obstacle à opérer telle saisie, peut bien constituer pour lui—ainsi qu'il a été généralement remarqué surtout en ce qui concerne des prises *neutres*—un motif de l'*omettre*, mais non pas un motif de commettre une violation du droit d'un neutre ou un acte de piraterie. La destruction d'une propriété neutre n'est jamais une "nécessité de la guerre," car le belligérant ne se défend pas par cela contre son ennemi. D'ailleurs le droit de la guerre repose tout entier sur la force comme seul titre juridique, condition *sine quâ non*. Le croiseur qui ne dispose pas de la force requise—soit en armement, en équipage, etc.—pour pouvoir remplir toutes les conditions d'une saisie légale (protection contre l'ennemi, amarinage, conduite au port, direction, etc.), n'est plus un capteur compétent. Comment un acte *remplaçant* la saisie pourrait-il être un titre d'appropriation, alors que la saisie elle-même ne l'est pas? Le croiseur qui, en pleine mer, détruit de la propriété privée non encore jugée et dont partant aucune preuve formelle n'a encore rendu manifeste le charactère ennemi ou coupable, s'arroge les attributions d'un juge, qualité qui ne lui revient pas.

Sur ces fondements et d'autres semblables, la défense absolue de détruire sur mer des prises neutres est à peu unanime: une telle destruction est partout qualifiée de criminelle. L'interdiction se recontre déjà pendant les guerres maritimes de la Revolution française—alors que tant d'autres violations des droits des neutres furent pourtant tolérées—par la règle qu'une destruction pareille ne peut jamais être légitimée, tout au plus peut-elle être excusée en cas de force majeure, et encore dans ce cas, l'État du capteur doit réparation pleine et entière aux lésés. Depuis lors, la défense contre ces sortes de destructions est devenue sévère. (2 La Neutralité, p. 531.)

Lawrence makes a clear distinction between the destruction of neutral and the destruction of belligerent property.

Meanwhile it is necessary to point out that a broad line of distinction must be drawn between the destruction of enemy property and the destruction of neutral property. The former has changed owners directly the capture is effected, and it matters little to the enemy subject who has lost it whether it goes to the bottom of the sea or is divided by public authority among those who have deprived him of it. But the latter does not belong to the captors till a properly constituted court has decided that their seizure of it was good in international law, and its owners have a right to insist that an adjudication upon their claim shall precede any further dealings with it. If this right of theirs is disregarded, a claim for satisfaction and indemnity may be put in by their government. It is far better for a naval officer to release a ship or goods as to which he is doubtful than to risk personal punishment and international complications by destroying innocent neutral property. Even where what is believed to be enemy property is concerned, and destruction or release become the only possible alternatives, it would perhaps be wise to adopt the latter unless the hostile nationality of the vessel and ownership of the cargo are too clearly established to admit of mistake. But the necessity of rapid movement in modern naval warfare, combined with the fact that neutral ports will in most cases be closed to prizes, is almost certain to result in an increase of the practice of destruction, unless the nations will consent to take a further step forward and prohibit the capture of private property unless it be contraband of war. (Principles of International Law, p. 406, § 215.)

Pradier-Fodéré says, after considering the generally enumerated grounds for the destruction of enemy private vessels—

En résumé la pratique internationale autorise, à titre exceptionel, les capteurs à détruire les navires ennemi qu'ils ont capturés, et la doctrine admet cette destruction dans les cas de nécessité absolue, dans les circonstances de force majeure, tout en reconnaissant, avec raison, que l'anéántissement d'un navire de commerce désarmé et conséquemment n'opposant aucune résistance, est un acte qui excite l'horreur. On considère qu'une pareille pratique est une aggravation des désastres inséparables des hostilités dirigées contre la propriété privée, mais on la tolère comme une nécessité fatale qui peut s'imposer parfois, et dont il faut se garder de faire abus, car indépendamment de l'atrocité morale d'un semblable holocauste offert à l'intérêt des

armes, l'anéantissement de vaisseaux et de cargaisons sur une vaste échelle serait, au point de vue économique, suivant l'observation très juste de de Boeck, un fait déplorable, dont le monde civilisé subirait le contre-coup, et qui fait reculer l'humanité aux plus mauvais jours de son histoire, avec la circonstance aggravante que les ruines accumulées par ce systéme de destruction dépasseraient aujourd'hui tout ce que les temps anciens peuvent offrir, étant donné le developpement du commerce international et la puissance et la rapidité dont sont désormais doués les vaisseaux de guerre. (8 Droit International Public, p. 659, §3185.)

Risley states his opinion as follows:

Where both ship and cargo have a hostile character her destruction is not a harsh measure, for the captor only destroys what would otherwise become his own property. In two wars destruction has been adopted as a deliberate policy—by the United States against Great Britain in 1812–1814, and by the Confederate States in the American civil war. In the latter case all the Confederate ports were blockaded, and they could not have sent in prizes if they had wanted to.

But where the cargo, or a portion of it, is neutral property, destruction can only be justified in exceptional cases, on the ground of military necessity, if the Declaration of Paris has any binding value. It is impossible to reconcile a policy of systematic destruction applied to neutral cargoes with the provision of the Declaration of Paris protecting neutral goods in enemy ships, except contraband. (The Law of War, p. 149.)

Sir Robert Phillimore says:

If a neutral ship be destroyed by a captor, either wantonly or under alleged necessity, in which she herself was not directly involved, the captor, or his Government, is responsible for the spoliation. The gravest importance of such an act to the public service of the captor's own State will not justify its commission. The neutral is entitled to full restitution in value. (International Law, III, CCXXXIII.)

Oppenheim, in his recent work, says of the destruction of neutral prizes:

That as a rule captured neutral vessels may not be sunk, burned, or otherwise destroyed is as universally recognized as that captured enemy merchantmen may not as a rule be destroyed. But whereas, as shown above in §194, the destruction of captured enemy merchantmen before a verdict is obtained against them is, in exceptional cases, lawful, it is a moot question whether the destruction of captured neutral vessels is likewise exceptionally allowed instead of bringing them before a prize court.

British practice does not, as regards the neutral owner of the vessel, hold the captor justified in destroying the vessel, however exceptional the case may be, and however meritorious the destruction of the vessel may be from the point of view of the government of the captor. For this reason, should a captor, for any reason whatever, have destroyed a neutral prize, full indemnities are to be paid to the owner, although, if brought into a port of a prize court, condemnation of vessel and cargo would have been pronounced beyond doubt. The rule is, that a neutral prize must be abandoned in case it cannot, for any reason whatever, be brought into a port of a prize court. (2 International Law, 469, sec. 431.)

In Atlay's edition of Wheaton's International Law is the following opinion:

If the prize is a neutral ship, no circumstances will justify her destruction before condemnation. The only proper reparation to the neutral is to pay him the full value of the property destroyed. Neutral cargoes are not always equally privileged. In 1870, the *Desaix*, a French cruiser, captured two German vessels, the *Ludwig* and the *Vorwaerts*, and burnt them on the day of capture. Part of the cargo of these vessels belonged to neutral owners (British subjects), and was therefore under the express protection of the third article of the Declaration of Paris. The owners claimed compensation for the destruction of their goods, but the *Conseil d'État*, in a judgment delivered by the President, of the French Republic, held that though the Declaration of Paris exempts the goods of a neutral on board an enemy's ship from confiscation, and entitles the owner to their proceeds in case of a sale, yet it gives him no claim for damage resulting from the lawful capture of the ship or from any subsequent and justifiable proceedings of the captors. As the destruction of the two vessels was held to have been necessary under the circumstances, no compensation was awarded to the owners of the neutral cargo. (P. 507, sec. 359e.)

The destruction of an enemy merchant vessel seized at sea is doubtless the easiest disposition of such a vessel. It has been argued that when such a vessel would surely be condemned by a prize court, it would be lost to the enemy owner in any case, and its destruction at sea would be no greater loss to the enemy owner, while the enemy destroying the vessel would not profit by the action as when the vessel is taken into port and regularly condemned and forfeited. It is thus argued that relatively it would be an advantage to the enemy owner's state that the vessel

certain to be condemned should be destroyed rather than be forfeited to the capturing state.

In Atlay's edition of Wheaton's International Law it is stated that—

> If the vessel belong to the enemy, and the captor has no means of retaining possession of her or of bringing her into port, he is then justified in destroying her, but it is his duty to preserve her papers and as much of the cargo as he can secure. The Confederate cruisers burnt many of their prizes at sea during the civil war, as their own ports were all blockaded by the Federal fleets; and though this was not a proceeding to be approved of, it was not a violation of international law. (P. 506, sec. 359d.)

In regard to the unqualified and universal obligation to release a neutral vessel, Profesor Moore raises a question. He says:

> Let us take, for example, the case of a neutral vessel laden with arms and munitions of war, which is captured by a cruiser of one belligerent while approaching a port of the other. Soon afterwards a superior force of the latter belligerent appears, so that the only way to prevent the arms and munitions of war from being conducted to their hostile destination is to burn or sink the vessel in which they are borne. Is the captor bound under such circumstances practically to hand over the vessel and cargo to his enemy? (7 Moore's International Law Digest, p. 523.)

Professor Moore concludes as follows:

> The discussion between Great Britain and Russia during the Russo-Japanese war serves to emphasize the potentially important relation of the question of contraband to the question of destruction. When publicists have spoken of the presence of "contraband" as justifying or excusing the destruction of a neutral ship that could not be brought in, they have no doubt had in mind cargoes composed of things specially adapted to use in war and confessedly contraband, such as arms and ammunition, and cannot be assumed to have contemplated the subjection of neutral commerce to general depredation under an extension of the categories of contraband. (Ibid., p. 527.)

Rules of the Institute of International Law.—After much discussion in earlier sessions in regard to limiting destruction to vessels of the enemy, the following regulations were adopted at the Heidelberg meeting of the Institute of International Law in 1887:

> SEC. 50. Il sera permis au capteur de brûler ou de couler bas le navire ennemi saisi, après avoir fait passer sur le navire de

guerre les personnes qui se trouvaient à bord et déchargé autant que possible la cargaison, et après que le commandant du navire capteur aura pris á sa charge les papiers de bord et les objets importants pour l'enquête judicaire et pour les réclamations des propriétaires de la cargaison en dommages et intérêts dans les cas suivants.

(1) Lorsqu'il n'est pas possible de tenir le navire à flot, à cause de son mauvais état, la mer étant houleuse;

(2) Lorsque le navire marche si mal qu'il ne peut pas suivre le navire de guerre et pourrait facilement être repris par l'ennemi;

(3) Lorsque l'approche d'une force ennemie supérieure fait craindre la reprise du navire saisi;

(4) Lorsque le navire de guerre ne peut mettre sur le navire saisi un équipage suffisant sans trop diminuer celui qui est nécessaire à sa propre sûreté;

(5) Lorsque le port où il serait possible de conduire le navire saisi est trop éloigné.

SEC. 51. Il sera dressé procès-verbal de la destruction du navire saisi et des motifs qui l'ont amenée; se procès-verbal sera transmis à l'autorité supérieure militaire et au tribunal d'instruction le plus proche, lequel examinera et, au besoin, complétera les actes y relatifs et les transmettra au tribunal des prises. (9 Annuaire de l'Institut de Droit International, 228.)

Usual procedure.—It is not easy to determine from a superficial examination such as is usually made by a visiting war vessel that destruction of an enemy merchant vessel would not involve serious complications in consequence of the presence of neutral goods on board which are regarded as exempt from capture even under an enemy flag.

The general principle followed by states is to regard the status of a seized vessel as in abeyance till determined by the court.

The right of search is preliminary to the right of seizure, and the right of seizure depends upon the result of the exercise of the right of search. * * * Even though there may be a legal seizure, it is the duty of the seizing vessel to follow such seizure by affording to the captured party all facilities of defense to which he may be entitled. (*The Nancy*, 37 U. S. Court of Claims, 401.)

In general any action toward a captured vessel in the way of appropriation or destruction of cargo must await condemnation by the court.

Destruction deprives the neutral of much evidence which he might otherwise show in support of the innocence of the destroyed property.

Practical objections to destruction.—There are certain practical considerations which at the present time make the destruction of enemy prize a serious question. Some of the considerations were mentioned in the Naval War College Discussions in 1905. Such possibilities as the following were mentioned as making destruction a doubtful proceeding: The possibility of error in the decision of a "quarter-deck court," the liabilities under the provision of the Declaration of Paris exempting neutral goods except contraband from capture, and the fact that unwarranted destruction of any neutral property entails not merely restitution of value but also damages. Certain practical difficulties also arise, as was said in 1905:

> The generally enunciated rule in regard to destruction of an enemy's vessel is, "an enemy's ship can be destroyed only after her crew has been placed in safety." If this is to be strictly interpreted, there would be considerable doubt as to whether the deck of a war vessel, whose commander fears that his prize is in imminent danger of recapture because of the approach of his enemy, would be a "place of safety." It is held that the property and persons of belligerents are subject to the hazard of war when coming within the field of operations. It would scarcely follow that such persons should be forced to assume such hazards, particularly when it is a matter of doubt before adjudication by the court whether the vessel is a proper subject for seizure. What is true of the belligerent vessel is even more emphatically true of a neutral vessel.
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> Many arguments may be urged against the destruction of neutral vessels. Before destruction in any case, the crew, passengers, and papers must be taken from the neutral vessel on board the belligerent ship. These are then immediately subjected to all the dangers of war to which a war vessel of a belligerent is subjected. Such a position may be an undue hardship for those who have not been engaged in the war and one to which they should not be exposed.
>
> A belligerent vessel, with crew, passengers, and papers of the destroyed neutral vessel, may enter a neutral port to which entrance with the vessel itself would be forbidden. This is in effect almost an evasion of the general prohibition in regard to the entrance of prize, because on board the belligerent vessel is

the evidence upon which the decision of the prize court of the belligerent will be rendered. It is certain that a neutral state would be very reluctant to admit within its territory a belligerent vessel having on board the crew and papers of one of its own private vessels which the belligerent had destroyed. The belligerent vessel might thus obtain the supplies from the neutral which would enable it to carry to its prize court the evidence in regard to capture.

It does not seem possible in view of precedent and practice to deny the right of a belligerent to destroy his enemy's vessel in case of necessity. Of course if the doctrine of exemption of private property at sea is generally adopted this right can no longer be sustained. The destruction of neutral vessels not involved in the service of the belligerent is sanctioned neither by precedent nor practice. (International Law Topics, Naval War College, 1905, pp. 73–75.)

Opinion of the British Commission.—The questions of capture, sending in, and destruction of private vessels was quite fully considered in the Report of the British Royal Commission on the Supply of Food and Raw Material in Time of War:

106. The only point in this connection which seems to demand special examination is whether the practice ordinarily followed, and generally prescribed, of "sending in" a prize with a view to inquiry into her character and that of her cargo by a prize court is, in every case, internationally obligatory. If so, the rule must obviously limit the number of prizes which any one cruiser can capture, to any purpose. The smaller the cruiser the less will she be able to provide the prize crews necessary for "taking in" any large number of prizes. For this and other reasons it has not unfrequently happened that captors have sunk or burned their prizes after a necessarily perfunctory inquiry into their nationality and trade.

107. With reference to ships and cargoes unquestionably belonging to the country of the captor or of the enemy, no question of international duty can arise, and a belligerent is entitled to give its cruisers such instructions as regards the disposal of such ships and cargoes as it may think fit. It is for the protection of "innocent" neutral property that international law insists upon opportunity being given for judicial examination into the facts of any capture in which such property may be involved. "Sending in" is, in such a case, internationally obligatory, when it is reasonably possible; and should the retention of the prize by the captor imperil his own safety, or be incompatible with the operations in which he is engaged, his proper course would seem to be to release her (although some national instructions may be quoted

to the contrary), taking from her a ransom bond, if he is allowed to do so by the regulations of his own Government.

108. The organization of modern war ships would appear to place new difficulties in the way of either "sending in" or destroying prizes on a large scale. Such ships, it is said, could spare but few of their men, trained, as they are, for highly specialized departments of labor, to act as prize crews; nor could they find room on board for the crews which it would be necessary to remove from prizes before proceeding to sink them.

146. Again, engines and machinery have reduced the space available for the *personnel* of warships as compared with that available in the days of sailing ships. A modern warship could only to a very limited extent furnish prize crews, and she would impair her fighting and steaming capacity by so doing. To some extent she could also accommodate crews of captured merchantmen or could carry a limited number of supernumeraries (if such surplus *personnel* of trained officers and men should be available) for the purpose of providing prize crews. It follows, therefore, that after a very few captures a warship will be face to face with the dilemma that she must either sink a fresh prize or must take it into port; and if the former alternative is adopted, she must take the crew on board and, owing to the inconvenience which their presence would cause, land them at the earliest opportunity. In either case the warship ceases to be a free operator against commerce. Hence modern conditions tend to limit the capturing power of regular war cruisers. These observations do not, however, apply to ocean trading steamers converted and armed for the purpose of attacking commerce.

It should be added that torpedo-craft (*i. e.*, destroyers and torpedo boats) can neither spare prize crews nor accommodate anyone above their complement numbers. If, therefore, they are employed against commerce, for which they were never intended, such craft could only compel merchant ships to follow them into port under threat of being torpedoed. Moreover, these craft can only operate within a comparatively short distance of their shore basis. (Vol. I, pp. 25 and 34, §§ 106–108, 146.)

The following questions by Sir John Colomb and replies by Professor Holland also appear in the minutes of the British Royal Commission on the Supply of Food and Raw Material in Time of War, 1905:

6833. In your paper you refer to the limitation put by international law upon the number of prizes taken, by the necessity of furnishing prize crews, and of taking prizes into port?—In the memorandum I discuss the question whether there is a limitation and how far it applies.

6834. Generally there is a limitation?—There is for the protection of neutral property, but for no other purpose. There is the chance that neutral property is involved; if it were not for that, it would not be necessary at all.

6835. Then, as regards the destruction of prizes, what about the crews on board those ships?—They must take out the crews, and they may take out the cargoes if they have time to do so.

6836. It is against international law, then, to sink them without taking out the crews?—Yes.

6837. Therefore, that is another limitation to the power of a man-of-war making seizures and destroying vessels, because it crowds the ship?—Yes, and it takes time to transfer, too.

6838. Therefore, there are two limitations put by international law: One is the necessity of furnishing a prize crew to bring the prize into court, and the other is that if they resolve to destroy her they must crowd their ship with her crew?—Yes. There is no necessity where she is clearly enemy property to spare her; that is only the case where neutral property is involved.

6839. But there is an equal obligation to save the crew, is there not?—Certainly, always.

6840. Therefore, in either case that particular limitation applies?—Always. I may say that the criticism of the Admiralty on the navy maneuvers in 1888, which I think I mentioned just now, was, that when they pretended to take so many prizes in such a short time, they did not allow themselves time in which to transfer the crews and, therefore, must be taken to have sunk them.

Treaty provisions in regard to contraband cargo.—In an early treaty of the United States with Sweden and Norway, 1783, it is provided in regard to the seizure of neutral vessels with contraband—

And in case the contraband merchandize be only a part of the cargo and the master of the vessel agrees, consents & offers to deliver them to the vessel that has discovered them, in that case the latter, after receiving the merchandizes which are good prize, shall immediately let the vessel go & shall not by any means hinder her from pursuing her voyage to the place of her destination. (Art. 13.)

Article XIII of the treaty with Prussia in 1799, which is still in effect, gives very liberal treatment.

And in the same case of one of the Contracting Parties being engaged in War with any other Power, to prevent all the difficulties and misunderstandings that usually arise respecting mer-

chandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles, carried in the vessels, or by the subjects or citizens of either Party, shall be deemed contraband so as to induce confiscation or condemnation and loss of property to individuals. Nevertheless it shall be lawful to stop such vessels and articles and detain them for such length of time as the captors think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying however a reasonable compensation for the loss such arrest shall occasion to the proprietors, and it shall further be allowed to use in the service of the captors, the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

In the treaty between the United States and Bolivia, 1858, is the following:

ARTICLE 19. The articles of contraband before enumerated and classified, which may be found in a vessel bound to an enemy's port, shall be subject to detention and confiscation, leaving free the rest of the cargo and the ship, that the owners of them may dispose of them as they see proper. No vessel of either of the two nations shall be detained on the high seas on account of having on board articles of contraband, whenever the master, captain, or super-cargo of said vessel will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great, or of so large a bulk, that they cannot be received on board the capturing ship without great inconvenience; but in this, as well as in other cases of just detention, the vessel detained shall be sent to the nearest convenient port for trial and judgment according to law.

Article 18 of the Brazilian treaty of 1828 is practically the same, as is article 19 of the Colombian (New Grenada) treaty of 1846.

In article 23 of the treaty with Haiti of 1864 it is provided that—

If it shall appear from the certificates that there are contraband goods on board any such vessel, and the commander of the same shall offer to deliver them up, that offer shall be accepted, and a receipt for the same shall be given, and the vessel shall be

at liberty to pursue her voyage unless the quantity of contraband goods be greater than can be conveniently received on board the ship of war or privateer, in which case, as in other cases of just detention, the vessel shall be carried to the nearest safe and convenient port for the delivery of the same.

Article XX of the treaty between the United States and Italy, February 26, 1871, states that—

In order effectually to provide for the security of the citizens and subjects of the contracting parties, it is agreed between them that all commanders of ships of war of each party, respectively, shall be strictly enjoined to forbear from doing any damage to, or committing any outrage against, citizens or subjects of the other, or against their vessels or property; and if said commanders shall act contrary to this stipulation, they shall be severely punished, and made answerable in their persons and estates for the satisfaction and reparation of said damages, of whatever nature they may be.

Résumé.—From the opinions, precedents, rules, treaties, etc., thus far stated it is evident that the treatment of neutral vessels in the time of war is not yet a fully settled question.

Situation V relates to one aspect of this question.

Situation V relates to the treatment of neutral vessels loaded for the most part with contraband overtaken by war vessels of the United States on the high seas when bound for a fortified port of State X when there is war between the United States and State X.

The vessels are in each case carrying contraband to the enemy of the United States, and in each the cargo is for the most part contraband.

These facts, however, do not change the status of the vessel unless the cargo and vessel belong to the same owner, in which case both vessel and cargo might be subject to like penalty; otherwise, unless the vessel were guilty of some other offense, the cargo only would be liable to penalty and the owner of the vessel would suffer sufficiently in the loss of freight and the delay caused by the capture and prize proceedings.

Considering these questions first upon the basis that the ship and cargo belong to different owners and that it is a simple act of commerce, it may be said that in each case

the penalty in general would be the loss of cargo for the owner of the contraband and the loss of freight for the owner of the vessel.

How would the fact that the commanding officer of the force overtaking the vessel bound with contraband for a fortified port of the enemy found the vessel carrying the contraband unseaworthy and not able to stand a voyage to a port where a prize court of the United States could sit affect the case?

If it were an enemy vessel he might as a military necessity sink the vessel and cargo after removing papers and crew and making proper survey, but no such penalty is prescribed for carriage of contraband by a neutral vessel. The commander under some treaties would be justified in removing the contraband from the vessel. This, in view of the circumstances, would be the best course if his ship could accommodate such a burden. He would also as a military necessity be justified in destroying the contraband if it was not possible to take it on board. In all cases he should bring in the papers relating to the cargo and observe the other naval regulations relating to such seizure. The vessel should be dismissed. Its penalty will be loss of freight.

If contraband cargo and vessel belong to the same owner both are liable to condemnation if sent to a prize court. It would, however, be exceedingly dangerous to allow officers occupied with the duties of war to pass judgment upon the relative cost of sending vessels to prize court as compared with the probable value of vessel and cargo, little of which could be examined in most cases. It would also impose a very serious burden upon the naval officer which he probably would not care to assume, particularly if the field of operations was remote from a prize court. The only safe course is to take on board or, in case of necessity, to destroy the contraband, retaining all necessary papers.

If, as he overtakes the neutral merchantman, the commanding officer discovers that he is in danger of immediate attack by the enemy, he should dismiss the mer-

chantman unless he can spare a prize crew to send her in. He would under no circumstances be justified in compelling a neutral, engaged in commerce for which there is a fixed penalty, to run additional risks of war by accompanying his fleet. Nor would he be justified in taking upon his own vessel, about to be attacked, the crew and perhaps the passengers of the neutral vessel in order that he might sink the vessel. The conditions are such that he is not in a position to inflict the legitimate penalty on the vessel because of his own danger. He would not on this account be warranted in inflicting a greater penalty and in subjecting neutral persons to the hazards of war.

When the personnel of his fleet is so reduced that he cannot spare a crew to take the vessel in, he should dismiss the vessel, though he, in accordance with the treaties with certain states, may take or destroy the cargo, retaining the proper papers.

Conclusion.—(*a*) If the contraband cargo and the seized neutral vessel have different owners, the contraband cargo, after proper survey, appraisal, and inventory, and with consent of the master, if in accordance with treaty provisions, may be taken, and the vessel, if guilty only of the carriage of contraband, should be dismissed, and the papers relating to the whole transaction should be forwarded to the prize court.

(*b*) If the master does not consent, the vessel and cargo are liable to the usual penalties for contraband trade.

(*c*) If the neutral vessel and contraband cargo belong to the same owner, the contraband cargo may be treated as in (*a*). The vessel, however, should if possible be sent to a prize court for adjudication, otherwise the vessel should be dismissed.

(*d*) Destruction, on account of military necessity, of a neutral vessel guilty only of the carriage of contraband entitles the owner to fullest compensation. Before destruction all persons and papers should be placed in safety.

Situation VI.

Three neutral merchant vessels are successively overtaken on the high seas by a war vessel of the United States when there is a war between the United States and State X.

(*a*) The first is found to have been guilty of a breach of blockade established by the United States at a port of State X and maintained with reasonably efficiency.

(*b*) A second neutral merchant vessel is found to have been carrying contraband to an unblockaded port of State X and is on the return voyage to its home port with the goods received in exchange for the contraband.

(*c*) The third neutral merchant vessel is a collier returning to its home port after accompanying the fleet of State X with a cargo of coal.

What, if any, action should the commander of the United States war vessel take in each case?

SOLUTION.

(*a*) The commander of the United States war vessel, unless certain that the neutral vessel breaking the blockade is exempt from seizure, should send the neutral vessel to the nearest prize court.

(*b*) The neutral merchant vessel on her return voyage is not liable to seizure because of carriage of contraband on the outward voyage and should not be detained for such cause.

(*c*) If a war vessel of the United States overtakes a neutral vessel which has accompanied the enemy fleet as a collier before the neutral vessel has completed her voyage by return to the port of departure or to a home port, the commander of the United States war vessel should not hesitate to seize the collier and send it with its crew to a prize court, or, if necessary, to treat it immediately as an enemy vessel might be treated under similar conditions.

NOTES ON SITUATION VI.

Reasons for Situation VI.—(*a*) Some recent discussions and opinions have raised questions as to what might be considered an effective blockade.

(*b*) The action of the prize court at Vladivostok in the case of the *Allanton* has raised questions as to the liability of vessels on the return voyage for carrying contraband on the outward voyage.

(*c*) The present necessity for collier service has given rise to the question of the liability of a neutral vessel engaged in this service in time of war.

Provision of the Declaration of Paris, 1856.—By the Declaration of Paris, 1856, to which the United States did not accede, but to the principles of which it has in practice adhered—

> Blockades, in order to be binding, must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

It is evident that even those states which acceded to this Declaration of Paris cannot interpret literally the last clause, "sufficient really to prevent access to the coast of the enemy." Probably no blockade could be maintained in this manner for any considerable length of time. During the night a fast vessel might pass in, or in a fog a vessel well acquainted with the locality might pass through, and in these days of submarines it may not be possible to guard against the passing of such a vessel. That it is not expected that the access to the coast will really be prevented is seen in the provisions for penalties for the breach of blockade. No penalties would be necessary under a literal interpretation of the declaration, for the access of vessels would be prevented, and if a vessel obtained access the blockade would not be effective, and hence the vessel would not be liable to penalty. This clause has been given a sane interpretation as meaning that the access of a vessel to the coast or her egress to the sea would be with evident danger. Such a blockade would be regarded as reasonably effective, and it is such a blockade that Situation VI considers.

To break such a blockade a neutral merchant vessel must resort to unusual means or efforts. If a vessel does this it would ordinarily imply the taking of an unusual risk for the hope of an unusual reward which would accrue in consequence of some special advantage gained by the blockaded belligerent. Penalty, therefore, would justly be inflicted by the other belligerent if possible in order to prevent aid to the blockaded belligerent.

A neutral merchant vessel may, however, approach a port that has been blockaded and find that there are no belligerent vessels before the port. It may pass in.

Admitting that these belligerent vessels have been scattered by a storm and that the neutral vessel passes out of the port just as the blockading vessels return to their stations, would it be held that the neutral vessel had violated an effective blockade? The general consensus is that the temporary scattering of vessels before a blockaded port by a storm does not break the blockade. The interpretation of the word "temporary" is still open to question. What should be considered a "temporary suspension?" Blumerincq proposes twenty-four hours' absence as the limit of "temporary suspension." Others attempt to fix a limit of distance, the character of the storm, etc., as factors in determining suspension. It is difficult to reconcile the doctrine of "temporary suspension" with the principles of the Declaration of Paris.

Position of the United States.—The United States recognizes the necessity of observing the rules of International law in maintaining a blockade, and in General Order No. 492 of the Navy Department, June 20, 1898, gives quite full statement for the guidance of blockading vessels and cruisers:

INSTRUCTIONS TO BLOCKADING VESSELS AND CRUISERS.

1. Vessels of the United States, while engaged in blockading and cruising service, will be governed by the rules of international law, as laid down in the decisions of the courts and in the treaties and manuals furnished by the Naval Department to ships' libraries, and by the provisions of the treaties between the United States and other powers.

The following specific instructions are established for the guidance of officers of the United States:

BLOCKADE.

2. A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous. If the blockading vessels be driven away by stress of the weather, but return without delay to their stations, the continuity of the blockade is not thereby broken; but if they leave their stations voluntarily, except for purposes of the blockade, such as chasing a blockade runner, or are driven away by the enemy's force, the blockade is abandoned or broken. As the suspension of a blockade is a serious matter, involving a new notification, commanding officers will exercise especial care not to give grounds for complaints on this score.

NOTIFICATIONS TO NEUTRALS.

3. Neutral vessels are entitled to notification of a blockade before they can be made prize for its attempted violation. The character of this notification is not material. It may be actual, as by a vessel of the blockading force, or constructive, as by a proclamation of the government maintaining the blockade, or by common notoriety. If a neutral vessel can be shown to have had notice of the blockade in any way, she is good prize and should be sent in for adjudication; but, should formal notice not have been given, the rule of constructive knowledge arising from notoriety should be construed in a manner liberal to the neutral.

4. Vessels appearing before a blockaded port, having sailed without notification, are entitled to actual notice by a blockading vessel. They should be boarded by an officer, who should enter in the ship's log the fact of such notice, such entry to include the name of the blockading vessel giving notice, the extent of the blockade, the date and place, verified by his official signature. The vessel is then to be set free; and should she again attempt to enter the same or any other blockaded port as to which she has had notice she is good prize.

5. Should it appear from a vessel's clearance that she sailed after notice of blockade had been communicated to the country of her port of departure, or after the fact of blockade had, by a fair assumption, become commonly known at that port, she should be sent in as a prize. There are, however, treaty exceptions to this rule, and these exceptions should be strictly observed.

6. A neutral vessel may sail in good faith for a blockaded port with an alternative destination to be decided upon by information as to the continuance of the blockade obtained at an intermediate port. But, in such case, she is not allowed to continue her voyage to the blockaded port in alleged quest of information as to the status of the blockade, but must obtain it and decide upon her course before she arrives in suspicious vicinity; and if the

blockade has been formally established with due notification, any doubt as to the good faith of such a proceeding should go against the neutral and subject her to seizure.

7. In accordance with the rule adopted by the United States in the existing war with Spain, neutral vessels found in port at the time of the establishment of a blockade will, unless otherwise ordered by the United States, be allowed thirty days from the establishment of the blockade to load their cargoes and depart from such port.

8. A vessel under any circumstances resisting visit, destroying her papers, presenting fraudulent papers, or attempting to escape, should be sent in for adjudication. The liability of a blockade runner to capture and condemnation begins and terminates with her voyage. If there is good evidence that she sailed with intent to evade the blockade, she is good prize from the moment she appears on the high seas. Similarly, if she has succeeded in escaping from a blockaded port she is liable to capture at any time before she reaches her home port. But with the termination of the voyage the offense ends.

9. The crews of blockade runners are not enemies and should be treated not as prisoners of war, but with every consideration. Any of the officers or crew, however, whose testimony before the prize court may be desired, should be detained as witnesses.

10. The men-of-war of neutral powers should, as a matter of courtesy, be allowed free passage to and from a blockaded port.

11. Blockade running is a distinct offense, and subjects the vessel attempting, or sailing with the intent, to commit it, to seizure, without regard to the nature of her cargo. The presence of contraband of war in the cargo becomes a distinct cause of seizure of the vessel, where she is bound to a port of the enemy not blockaded, and to which, contraband of war excepted, she is free to trade.

From these instructions it may be seen that dispersion from stress of weather is not held to interrupt the continuity of the blockade, though no definite time of absence or other limiting specification is indicated. Voluntary departure, except for chase of a blockade runner, is held to break the blockade, as is flight before an enemy.

There are numerous conditions under which a neutral vessel may pass through or approach a blockade without guilt. These are mentioned in the clauses under "Notifications to neutrals."

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Opinion of Pradier-Fodéré.—The general principle is, "if a vessel has succeeded in escaping from a blockaded port she is liable to capture before she reaches her home port. But with the termination of the voyage the offense ends."

Pradier-Fodéré well says:

Il se peut que du temps de Grotius la notion de la *violation* ait été moins étendue qu'elle ne l'est aujourd'hui; qu'avant Bynkershoëck l'entrée seule dans les ports bloqués ait été considérée comme illicite, tandis que de nos jours on regarde comme telles l'entrée et la sortie, suivant les cas, etc.; ce qu'il y a de certain, c'est qu'il n'y a pas de matière où le pêle-mêle des théories et des pratiques contraires soit plus inextricable et fasse de cette question un objet d'étude plus indigeste: les gouvernements restreignant dans des proportions justes, ou élargissant outre mesure, la notion du fait délictueux, suivant qu'ils sont disposés à épargner ou à atteindre le plus possible le navigation étrangère; la doctrine soutenant trop souvent avec docilité, dans chaque pays, les vues de son gouvernement, ou s'émancipant et se perdant dans le labyrinthe de ses distinctions subtiles et des systèmes; enfin les conseils et tribuneaux de prise posant dans leurs décisions des principes, tantôt très larges, tantôt très rigoureux. Pour éviter de se perdre dans ce mélange obscur d'opinions et d'applications diverses, il est nécessaire de se laisser plus que jamais guider par les lumières du sens commun, et de rechercher, non *ce qui est* (c'est á dire à peu près le chaos), mais *ce qui doit être.* Or, le bon sens se joignant aux principes les plus élémentaires du droit, il s'agisse d'un blocus *régulier;* qu'il n'y ait eu un *acte matériel* constituant soit une *violation,* soit une *tentative de violation;* que le navire neutre arrêté comme violateur *ait eu connaissance* du blocus; que l'existence du blocus ait été portée à sa connaissance, *sur la ligne méme de l'investissement;* que le navire neutre ait été *surpris en flagrant délit.* Telles sont les conditions essentielles principales de al violation des blocus, conformes à la raison, à l'équité et aux vrais principes du droit; tout ce qui est en dehors d'elles est irrationel, arbitraire et inique. (8 Droit international public, p. 391, §3139.)

(*a*) *Conclusion as to the blockade.*—In Situation VI (*a*), a neutral merchant vessel is overtaken in time of war by a war vessel of the United States and is found to have been guilty of a breach of blockade established and maintained with reasonable efficiency by the United States. The war vessel in such case would of course only take

action against the neutral vessel if overtaken on the high seas or within belligerent jurisdiction and before return to her home port. The commander of the war vessel would further be bound to act under orders such as are shown in General Order No. 492. He would be bound also by international law, by treaties, etc. When in doubt in regard to any of these points, the safe course is to send the vessel in for adjudication by the prize court.

The conclusion in this case would therefore be that the commander of the United States war vessel, unless certain the neutral vessel breaking the blockade was exempt from seizure, should send the neutral vessel to the nearest prize court.

Contraband trade.—In concluding his discussion on the sale of contraband, Professor Moore says:

> The fundamental principles are simply these: From the point of view of *neutrality* the question of *unlawfulness* is presented in two aspects, (1) that of international law and (2) that of municipal law. Offenses under (1), i. e., acts unlawful by international law, are divided into two classes, (*a*) acts which the state is bound to prevent and (*b*) acts which the state is not bound to prevent, and which therefore are not usually offenses against municipal law. The dealing in contraband belongs under (1) (*b*), for it is (1) unlawful by international law, as is shown by the fact that the noxious articles may be seized on the high seas and *confiscated;* but (*b*) it is not an act which it is the duty of the neutral state to prevent, and therefore is not usually prohibited by municipal law.
>
> Why is the neutral state not bound to prevent it? Simply because, from obvious considerations of convenience, it has been deemed just to confine within reasonable bounds the duty of the neutral state to interfere with the commerce of its citizens, even for the purpose of repressing unneutral acts. The principal interest to be subserved being that of the belligerents, it is left to them, in respect of many acts in their nature unneutral, to adopt measures of self-protection; and neutral states are deemed to have discharged their full duty when they submit to the belligerent enforcement of such measures against their citizens and their commerce. (7 Digest of International Law, p. 972.)

Vladivostok court on the Allanton.—The decision of the Vladivostok prize court in the case of the *Allanton* states that the visiting party from the Russian war vessel found the *Allanton* a British steamer—

with a cargo of 6,500 tons Japanese coal. Besides the captain, Henry Motger, and the crew, consisting of 30 men of different nationalities, was a young Japanese who declared he had embarked in Mororan for the purpose of going to America, which statement was confirmed by the captain. Examination of the ship's documents showed that the *Allanton* was going to Singapore with coal from Mororan; nevertheless the officer requested the captain to take all documents and accompany him on board the cruiser for the purpose of giving more exact information. To this the captain demurred, but sent on board his mate, Henry Mitchell, with the documents. At the second examination of the documents it turned out that the official log book and the chief officer's log book were missing, and these were immediately ordered to be sent for examination. The official log book was not in order, being kept up only until May 2/15, 1904. According to remarks in chief officer's log and also other documents it became evident that in May the *Allanton* brought to Sasebo a full cargo of Cardiff coal. After having discharged this contraband in Sasebo, the steamer went to Mororan, where she took a new cargo of Japanese coal according to documents destined for Singapore and addressed to Messrs. Patterson, Simon & Co. The admiral being doubtful as to the genuineness of the steamer's destination, gave orders to have her taken to Vladivostok. On June 6/19 steamer arrived in Vladivostok under command of Lieutenant Petroff, and the case was given to the prize court for trial. At trial captain stated that steamer was registered at Glasgow, owned by W. Rea, resident in Belfast. On February 8/21, she left Cardiff with coal bound for Hongkong, by way of Cape of Good Hope. Upon her arrival at Hongkong the captain received orders to proceed to Sasebo with cargo. Having discharged her cargo there, she proceeded to Mororan, where new cargo of coal was taken for Singapore. On her way to this port she was detained by the Russian cruisers in the Japanese Sea.

The Japanese, Tatiki Miachara, declared that he embarked on the *Allanton* in Mororan intending to go to America for the purpose of completing his education, but neither a passport nor any other document to prove his identity were in his possession.

* * * * * * *

Having taken into consideration all circumstances of the case referred to, the court decided:

"1. That the S. S. *Allanton* was arrested correctly, under observance of the rules in paragraphs 2, 3, 15, and 17 of the statutes of Maritime Prizes, and on the basis of fully satisfactory reasons justifying the steps taken. Such reasons are:

"(*a*) The irregularity of the ship's log.

"(*b*) Indisputable proof of the ship having delivered recently at a Japanese port a full cargo of contraband of war with full knowledge and sanction of owner.

"(*c*) The chartering of the steamer by a Japanese trading company and the fact that she was loaded exclusively with coal, being contraband of war, in case the real destination was not Singapore but a hostile port or squadron."

Proceeding to consider the question of the owner's standpoint with regard to the obligations of neutrality, the court found that—

"2. The owner 'took active measures that the cargo should not be exposed to detention on its way to Japan.'"

With regard to the second trip, during which the *Allanton* was arrested by the Russian cruisers in the Japanese Sea, this time the court also turned its attention to the following important circumstances:

"(*a*) The course the steamer kept on her way to Mororan passed through the whole theater of present war * * * which could be very easily avoided by taking the way through the ocean, so much the more as the last-mentioned way to Singapore, if this were the destination, would have been only a trifle longer, about 100–120 miles.

"(*b*) The statement given by the young Japanese, Tatiki Miachara, embarked in the *Allanton* at Mororan for the purpose of going to America to finish his education, is apparently invented, as Miachara had no document whatever in his possession to prove his identity, whereas, taking into consideration the utterly strict passport rules in Japan and with regard to Asiatics in America, it appears impossible for a Japanese subject, not having served his time in the army, and not having in his possession a certificate stating his being released from the same, to leave Japan without permission from the local authorities and without a passport in his possession.

"(*c*) The discontinuance of remarks of arrivals at ports in the official log, from the moment the ship left Hongkong, and further the fact that even after the first illegal trip was finished no such remarks have been made, seem to prove that on the second trip Singapore was no more the destination of the *Allanton* than Hongkong was on the first.

"3. Concerning the cargo the *Allanton* carried when arrested, the fact that the steamer was chartered directly by the Japanese company for taking a full cargo of coal from Mororan and the nonexistence of any statement whatever showing that the coal had become the property of a neutral proves that the cargo in question was still the property of the Japanese company; consequently, being hostile property, accompanied by the Japanese, Miachara, presumably in the capacity of agent.

"A combination of all details and circumstances mentioned above and the character of the cargo convinces the court that the real destination of this hostile cargo was by no means Singapore, but a Japanese or Corean port, or even the enemy's fleet maneuvering in the open sea, on account of which the cargo in question was declared by the court to be contraband of war in accordance with paragraph 6, clause 8 of H. I. M. order of February 14, 1904.

"The court considers it proved that illegal actions have been exercised by the owner of the ship and captain of the same for the strengthening of the enemy's military store by bringing him coal, necessary for carrying on naval warfare, and that the steamer *Allanton* has thereby forfeited the rights of neutrality.

"Considering the circumstances in this case in connection with state of affairs in the theater of war, the court finds—even independent of the proved fact that the *Allanton* was about to bring contraband of war to the enemy—that the facts referred to are so much the more important, as ships of neutrals serving in the place of the Japanese merchant service, and thus enabling the Japanese Government to utilize the latter for furtherance of war operations, exercise a great influence on the results of the war, disadvantageous to Russia, not speaking of the fact that such actions on the part of neutrals, being left unpunished, would make it almost impossible for Russia to follow up one of the most important and natural objects in naval war—to cut off the enemy from the possibility of availing himself of the sea as a means of communication."

* * * * * * *

The prize court considered the *Allanton*, as well as her cargo, fully legal prize, and accordingly decided to confiscate the same in favor of the Imperial Government.

Opinions of the case.—Smith and Sibley, reviewing the case of the *Allanton*, say:

The *Allanton*, as appears from the argument of M. Sheftel, could not, on any fair construction, be considered as engaged in a contraband transaction, either when proceeding to Mororan or when leaving that port. M. Sheftel proceeded to observe that the majority of the authorities on international law held that a vessel which succeeded in conveying contraband to a hostile port and was captured, not while engaged in doing so, but subsequently on the return voyage, could not be held liable to confiscation. Such was the principle enunciated by Prof. Franz Despagnet, Prof. Franz von Liszt, and Prof. de Martens. Prof. de Martens, in his work, "International Law among Civilized Nations," positively asserted that "In order that the seizure of a neutral vessel for conveying contraband should be lawful, it

is necessary that the neutral vessel in question should be caught in *flagrante delicto*. Capture subsequent to the discharge of the unlawful cargo is not justifiable in law." In an even more striking sentence M. Sheftel observed that, according to Russian naval regulations in force, it was not permissible to seize a vessel for conveying contraband after she had discharged her cargo at the hostile port. The Russian regulations of March 27, 1900, regarding maritime prizes, declared: "Mercantile vessels of neutral nations are liable to be confiscated as prizes when captured in the act of conveying contraband to the enemy or to an enemy port." This clearly implies that, according to regulations, a vessel is not liable to be seized after discharge of her cargo at the hostile port. In the case of the *Imina*, Sir W. Scott said:

"Taking it, however, that they (the goods conveyed, ship timber) are of such a nature as to be liable to be considered contraband on a hostile destination, I cannot fix that character on them in the present voyage. The rule respecting contraband, as I have always understood it, is that the articles must be taken *in delicto* in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations you cannot take the proceeds on the return voyage. * * * If the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not generally held to attach."

It therefore follows that the Vladivostok prize court, in proceeding on the principle that a vessel is liable to be confiscated after she has conveyed contraband to a hostile port, decided contrary both to modern continental maritime law as enunciated by its greatest living exponent, to maritime law as enunciated a hundred years ago by Lord Stowell, and to Russian naval regulations of the present day. (International Law as interpreted during the Russo-Japanese War, Appendix F, p. 438.)

Decision of St. Petersburg court on appeal.—The supreme court at St. Petersburg, in the case of the *Allanton* on appeal, said:

The fact of the steamer *Allanton* having embarked a cargo at an enemy's port and from a Japanese company cannot serve as sufficient grounds for confiscation, inasmuch as, if the Japanese company be considered the owners of the cargo previous to its delivery to the holders of the bill of lading, it would yet not be liable to confiscation in virtue of Article II of the Maritime Prize Regulations, which provides that a neutral flag covers an enemy's cargo, provided that it is not contraband, whereas coal could be recognized as contraband only in such case if it were being conveyed to the enemy or to an enemy's port, which was not so

in the present case. The circumstances which, in the first instance, led to the surmise that the cargo of the steamer *Allanton* was destined for delivery to the enemy or to an enemy's port, are removed by virtue of the documents submitted at the trial of the case in the supreme prize court, and have no definite effect.

The delivery by the *Allanton* on her first voyage of a cargo of Cardiff coal to the Japanese port of Sasebo cannot serve as sufficient ground for the confiscation of the cargo subsequently shipped from Mororan to Singapore, as, in virtue of Article XI of the Prize Regulations, vessels of neutral nationality are liable to confiscation only in event of their being caught in the act of conveying contraband to the enemy or to an enemy's port, and by no means if they had on a previous occasion carried contraband to the enemy.

The route which was taken by the steamer *Allanton* from Mororan has been accepted as the shortest, as also the statement of Captain Motger to the effect that, in carrying coal not as contraband, but to a neutral port, he had no cause to fear detention of the vessel. Although, according to the decision of the Chief Hydrographic Department, the majority of vessels prefer the ocean route, owing to frequent fogs which occur in the Japanese Sea making it dangerous for navigation, but as it would appear from this decision that some vessels nevertheless take the route across the Japanese Sea, the route taken by the captain of the *Allanton* cannot serve as evidence against him. The discovery on board the vessel of the Japanese, Tatiki Miachara, if there had been any cause for suspicion in the beginning, in view of his possessing no documents establishing his identity, this suspicion is now removed, as on further investigation of the case it was not proved that he had acted as agent for the enemy's government, or had been intrusted with the delivery of the cargo of coal. The omission of entries in the official log book from the 15th of May, 1904, although an infringement of the regulations for keeping log books, is yet insufficient for disqualifying the evidence brought forward in regard to the steamer having been directed to Singapore, more especially as the entries in the other ship's log were properly made.

Admitting, on the foregoing grounds, that the steamer *Allanton* and her cargo were not liable to confiscation, the supreme prize court, guided by Article XXX of the Prize Regulations, imperially confirmed, then considered the question as to whether there were sufficient grounds for the detention of the steamer *Allanton* and her cargo, and whether the established conditions and rules were observed on such detention. The supreme court found that there were in every respect sufficient grounds for suspicion that her cargo was destined for the enemy or for the enemy's port.

The Admiralty court at St. Petersburg rendered a decision in the appeal of the *Allanton*, October 9/22, 1904:

1. The steamer *Allanton* and cargo, consisting of coal, to be considered as not subject to confiscation and to be set free.
2. The arrest of the steamer and cargo to be considered as having been made on sufficient ground.
3. The decision of the Vladivostok prize court in that part which relates to the confiscation of the vessel to be reversed. (U. S. Foreign Relations, 1905, p. 754.)

Opinion of United States court on carriage of contraband.—In the case of the sloop *Ralph* the court held the opinion that—

Upon the general question of contraband it may be said: The transportation of contraband articles to one of the belligerents is in itself an assault for the time being upon the other belligerent, in the fact that it may furnish them with the weapons of war and thereby increase the resources of their power as against their adversary; and for that reason, upon a broad ground of self-preservation incident to nations as well as individuals, the parties aganist whom the quasi assault is made have a right to defend themselves against the threatened blow by seizing the weapon before it reaches the possession of their enemy.

The seizure of contraband is not only punishment, but it is also prevention, and the paramount purpose of its exercise is prevention, just as in self-defense on the part of persons it is to protect; but when the act is accomplished, the damage suffered, and the danger passed, then the incidents of self-defense cease. The extent to which the right to seize may be carried upon other property belonging to the offending party depends upon a variety of circumstances and conditions. The effect of the seizure may be confined to the contraband articles alone, but may extend beyond those to other property of the guilty party by way of punishment incident to the wrong of carrying contraband.

Upon that general doctrine of the subject of contraband there is a qualification which was recognized by the courts at the time the capture of this ship was made. The effect of that qualification is that the outgoing voyage must be free from the taint of fraud and misrepresentation made or practiced by persons in charge of vessel upon the rights of belligerents. (39 U. S. Court of Claims Reports, 204.)

So early as 1806, Mr. Madison, Secretary of State, wrote that the rule " that a vessel on a return voyage is liable to

capture by the circumstances of her having on the outward voyage conveyed contraband articles to an enemy's port" is an interpolation in the law of nations. (7 Moore International Law Digest, p. 748.)

(*b*) *Conclusion as to liability for carriage of contraband.*—In Situation VI (*b*) a neutral merchant vessel is returning to a home port with the cargo received in exchange for a contraband cargo previously delivered to a belligerent port. The offense involved in the carriage of contraband is deposited with the contraband. If the neutral merchant vessel is not guilty of any offense on the return voyage the carriage of contraband on the outward voyage involves no penalty and the neutral merchant vessel should not be detained.

Liability of neutral vessel for service as collier.—Under ordinary circumstances coal in the time of war is conditional contraband and as such its liability to confiscation is determined by its destination. If destined for the enemy fleet it would without question be regarded as liable to capture until the cargo was deposited. The contraband cargo only would be liable to confiscation unless the owner of the vessel was also an owner in the cargo or unless the vessel had false papers or was involved in some manner other than as simple carrier of freight in the ordinary manner.

The neutral vessel under consideration in Situation VI (*c*) has been accompanying the fleet as collier and is returning to her home port after this service.

This act is not a simple act of carriage of contraband of which the guilt is deposited with the delivery of the contraband, but an act of service on the part of the neutral vessel. The service has been in aid of the belligerent as much as would be the service of one of the belligerent's own colliers, for the vessel has accompanied the fleet with the cargo of coal and is now returning from the service. Such an act involves participation in the actual war undertakings of State X. The neutral vessel which has thus accompanied a fleet could have no destination except such as that of the fleet and must be under the control

of the commander of the fleet and practically a part of the fleet. The belligerent has received more than the simple supply of coal. The collier has been at his service, accompanying the fleet, and giving a certainty of supply as demanded.

The collier has, on the other hand, received the protection of the fleet to the full extent. Its compensation has probably been certain and adequate. It has not merely furnished coal in the manner of an ordinary sale or even as an ordinary transaction in contraband. Up to the time of its return, i. e., till it had completed its service, it was practically under convoy of the belligerent fleet. The whole career of the vessel while engaged as a collier for the fleet was such as to identify the interests of the collier with those of the belligerent. The act was something more than the carriage of contraband. It was an act of unneutral service. It was an act of the nature of service "for a warlike purpose in aid of a foreign state" which under the British Foreign Enlistment Act of 1870 forfeits ship and equipment to the Government.

If the ship is guilty of an offense in thus being "employed in the military or naval service of any foreign state at war with any friendly state" (section 8, Act of 1870) which makes it liable to confiscation by its own government then the offense as concerns the belligerent against whom the vessel has served is certainly equal and an equal penalty would be justified, i. e., confiscation of the ship.

Further, the personnel of the collier has identified itself with the personnel of the belligerent and has practically entered the service of the belligerent. The personnel of the collier would therefore be liable to treatment of prisoners of war, as persons in the service of the enemy. The British and other neutrality laws make such service penal by municipal law so it would be no injustice to make the officers and crew liable to the laws of war.

It may be argued, however, that the vessel under consideration is returning from its service as collier accompanying the fleet and that it is not liable after the com-

pletion of the service with the fleet. The British Foreign Enlistment Act of 1870, section 8, is very definite as relates to such service and its penalties.

If any person within Her Majesty's dominions, without the license of Her Majesty, does any of the following acts, that is to say—

(3) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or

(4) Dispatches, or causes or allows to be dispatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state;

Such person shall be deemed to have committed an offense against this act, and the following consequences shall ensue:

(1) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labor.

(2) The ship in respect of which such offense is committed, and her equipment, shall be forfeited to Her Majesty.

The interpretation clause, section 30, defines "naval service" and "equipping" as follows:

"Naval service" shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship, when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, storeship, privateer, or ship under letters of marque; and as respects a ship include any user of a ship as a transport, storeship, privateer, or ship under letters of marque.

"Equipping" in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping shall be construed accordingly.

"Ship and equipment" shall include a ship and everything in or belonging to a ship.

The neutral can not plead his nationality as an exemption for the consequences of an act which is in its nature hostile.

(*c*) *Conclusion as to treatment of neutral collier serving enemy fleet.*—The collier has therefore been engaged in unneutral service. This service is not to be confused with the carriage of contraband, which is a commercial undertaking and renders the goods liable to seizure, but the service of the collier is unlike in nature, in intent, and in penalty. As the neutral agent has identified himself with the belligerent, the United States is justified in treating him as a belligerent.

The regulations in regard to the liability for transport service for the enemy hold that the penalties extend to the ship and personnel. The liability for the breach of blockade remains till the completion of the return voyage. The liability of the collier under consideration should certainly not be considered as deposited with its cargo. If it were thus regarded a fleet of neutral colliers would be of greater advantage to a belligerent than a fleet of its own. The neutral colliers while bound for the fleet might be liable to confiscation, etc., as would the belligerent colliers, but after discharging the coal and leaving the fleet would not, as would the belligerent colliers, be liable to seizure. Therefore the neutral collier engaged in belligerent service could go on from port to port incurring liability only when loaded with coal and bound for the enemy. Such a contention would seem hardly reasonable when by domestic law such service is penalized.

In Situation Vi (*c*), therefore, when a war vessel of the United States overtakes a neutral collier returning to its home port after accompanying the fleet of its enemy, State X, the United States commander should not hesitate to seize the collier and send it with its crew to a prize court, or, if necessary, to treat it immediately as an enemy vessel might be treated under similar conditions.

Conclusion.—(*a*) The commander of the United States war vessel, unless certain that the neutral vessel breaking the blockade is exempt from seizure, should send the neutral vesel to the nearest prize court.

(*b*) The neutral merchant vessel on her return voyage is not liable to seizure because of carriage of contraband

on the outward voyage and should not be detained for such cause.

(*c*) If a war vessel of the United States overtakes a neutral vessel which has accompanied the enemy fleet as a collier before the neutral vessel has completed her voyage by return to the port of departure or to a home port, the commander of the United States war vessel should not hesitate to seize the collier and send it with its crew to a prize court, or, if necessary, to treat it immediately as an enemy vessel might be treated under similar conditions.

Situation VII.

The commander of a war vessel of the United States while cruising off the coast of State X is requested by a duly authorized agent of State X to prevent a merchant vessel of the United States from taking contraband into a port of State X which happens to be near and to be in the hands of insurgents. The agent of State X claims that the merchant vessel has sailed from the United States in violation of neutrality laws.

What action should the commander take?

SOLUTION.

The commander of the United States war vessel should decline to interfere to prevent the carriage of goods by a merchant vessel of the United States even though the goods are bound to a port in the hands of an insurgent and he is requested to interfere by the authorities of the parent state.

NOTES ON SITUATION VII.

The United States law.—The attempt has frequently been made to bring the sale and carriage of contraband under the neutrality laws of the United States; particularly has been cited section 5283 of the Revised Statutes:

> Every person who, within the limits of the United States, fits outs and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming, of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty

of a high misdemeanor, and shall be fined not more than ten thousand dollars and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer and the other half to the use of the United States.

Opinions of Mr. Bayard.—In 1885, a period of numerous insurrections, Mr. Bayard, in a communication to the Colombian minister, who protested against certain shipments of arms from the United States, said:

DEPARTMENT OF STATE,
Washington, March 25, 1885.

SIR: On the receipt of your note of the 17th instant complaining that certain ordinary merchant vessels have sailed, or are about to sail, from the port of New York having on board as part of their cargoes boxes of arms and ammunition intended for the purpose of assisting armed rebels who are now resisting on the Atlantic coast of Colombia the authority of that Republic, I did not fail to communicate the subject of its contents to the proper authorities.

I now have the honor to inform you that it appears from a recent communication from my colleague, the Attorney-General, that the United States attorney at the port of New York has been directed to be vigilant in enforcing those statutory provisions which apply to the circumstances in which Colombia is unhappily involved.

In this connection I deem it proper to invite your attention to the fact that the existence of a rebellion in Colombia does not authorize the public officials of the United States to obstruct ordinary commerce in arms between citizens of this country and the rebellious or other parts of the territory of the Republic of Colombia. It is a well-established rule of international law that the allowance of such commerce is no breach of duty toward the friendly government whose enemies may thus be supplied with arms.

As no charge is made that the vessels in question are armed vessels intended for the use of the rebels mentioned, or that military expeditions are being set on foot in this country against the Republic of Colombia, the duties of this Government are limited to the enforcement of the statutory provisions which apply to such cases.

Accept, etc., T. F. BAYARD.

In another communication two days later Mr. Bayard says:

It has not as yet been possible to ascertain whether these articles are intended to be used in expeditions hostile to the Colombian Government, but even should this prove to be the case, this Government, however much it may regret the encouragement in any manner from this country of the revolt against the constitutional authorities of its sister Republic, must maintain the right of its citizens to carry on without a violation of the neutrality laws the ordinary traffic in arms with the rebellious or other parts of that Republic, as more particularly set forth in my note to you of the 25th instant. (U. S. Foreign Relations, 1885, pp. 238, 239.)

Mr. Bayard, in 1885, writing of certain attempts of the Government of Colombia to close by decree ports held by the Colombian insurgents, said:

After careful examination of the authorities and precedents bearing upon this important question, I am bound to conclude, as a general principle, that a decree by a sovereign power closing to neutral commerce ports held by its enemies, whether foreign or domestic, can have no international validity and no extraterritorial effect in the direction of imposing any obligation upon the governments of neutral powers to recognize it or to contribute toward its enforcement by any domestic action on their part. Such a decree may indeed be necessary as a municipal enactment of the state which proclaims it, in order to clothe the Executive with authority to proceed to the institution of a formal and effective blockade, but when that purpose is attained its power is exhausted. If the sovereign decreeing such closure have a naval force sufficient to maintain a blockade, and if he duly proclaim such a blockade, then he may seize, and subject to the adjudication of a prize court, vessels which may attempt to run the blockade. If he lay an embargo, then vessels attempting to evade such embargo may be forcibly repelled by him if he be in possession of the port so closed. But his decree closing ports which are held adversely to him is, by itself, entitled to no international respect. Were it otherwise the *de facto* and titular sovereigns of any determinate country or region might between them exclude all merchant ships whatever from their ports, and in this way not only ruin those engaged in trade with such states, but cause much discomfort to the nations of the world by the exclusion of necessary products found in no other market.

The decree of closure of certain named ports of Colombia contains no information of an ulterior purpose to resort to a pro-

claimed and effective blockade. It may, therefore, be premature to treat your announcement as importing such ulterior measures; but it gives me pleasure to declare that the Government of the United States will recognize any effective blockade instituted by the United States of Colombia with respect to its domestic ports not actually subject to its authority. This Government will also submit to the forcible repulsion of vessels of the United States by any embargo which Colombia may lay upon ports of which it has possession when it has power to effect such repulsion; but the Government of the United States must regard as utterly nugatory proclamations closing ports, which the United States of Colombia do not possess, under color of a naval force which is not even pretended to be competent to constitute a blockade. (Foreign Relations U. S., 1885, p. 256.)

In the year 1886 Mr. Bayard sent the following communication to Mr. Hall, United States diplomatic representative in Central America:

DEPARTMENT OF STATE,
Washington, February 6, 1886.

SIR: I transmit, for your information, copies of the correspondence exchanged between Mr. Jacob Baiz, consul-general of Honduras at New York, and this Department touching the movements of the American steamer *City of Mexico* outside of the jurisdiction of the United States. It will be seen from the letters of Mr. Baiz that he labors under the impression that to prevent a violation of our neutrality laws this Government should instruct its vessels of war to keep a watch on the *City of Mexico*, having, as is alleged, an unlawful purpose against the peace of Honduras.

I have not thought it necessary to discuss the matter with Mr. Baiz. I have therefore confined myself to the statement that the acts complained of were committed, if at all, against the sovereign neutrality of Great Britain and should be dealt with according to British law, and that this Government had already given abundant proof of its desire to prevent any violation of its neutrality within the jurisdiction of the United States.

With these prefatory remarks it appears not inappropriate to add a few general observations upon the subject.

It is usual, when application is made to this Department to take action to prevent what are supposed to be impending breaches of neutrality, to base such application on affidavits, or on statements of proof susceptible of being reduced to affidavits, on which the interposition of the Department is asked. This requisite has not been insisted upon in the present instance, for, supposing the case presented by the letter of Mr. Baiz to be fully verified, it is not one on which any present action of the Department could be based.

Breaches of neutrality may be viewed by this Government in two aspects: First, in relation to our particular statutes, and secondly, in respect of the general principles of international law. Our own statutes bind only our own Government and citizens. If they impose on us a larger duty than is imposed on us by international law, they do not correspondingly increase our duty to foreign nations, nor do they abridge our duties if they establish for our municipal regulation a standard less stringent than that established by international law.

The complaint that Mr. Baiz makes is, that the steamship *City of Mexico*, a passenger and freight vessel, claimed to be entitled to carry the flag of the United States, took on board at Belize, January 12 last, when on her ordinary coasting route, some political refugees who it is supposed were meditating hostile action against the Government of Honduras.

It will scarcely be contended that such an act as this, even supposing it would be regarded as a breach of neutrality if committed within the jurisdiction of the United States, can be imputed to the United States when committed in a foreign port; nor can it justly be urged that, because the vessel in question sails under the flag of the United States, it is the duty of this Government to send cruisers to watch her to prevent her from committing breaches of neutrality when on her passage from one foreign port to another. For this Government to send armed vessels to such ports to control the actions of the *City of Mexico* would be to invade the territorial waters of a foreign sovereign. For this Government to watch its merchant and passenger vessels on the high seas, to stop them if they carry contraband articles or passengers meditating a breach of neutrality, would impose on the United States a burden which would be in itself intolerable, which no other nation has undertaken to carry, and which the law of nations does not impose.

In what has been stated I have referred exclusively to the international obligations imposed on the United States by the general principles of international law, which are the only standards measuring our duty to the Government of Honduras. Whether the *City of Mexico*, when she returns to her home port, or those concerned in her or in this particular voyage, may be subject to adverse procedure under our neutrality statutes, I have not deemed it necessary here to discuss or decide.

I am, etc., T. F. BAYARD.

(U. S. Foreign Relations, 1886, p. 51.)

Opinion of Mr. Blaine.—It has quite often happened that during insurrections the established government has tried to obtain the rights of war without admitting its existence. Sometimes, as in 1891 in the case of Chile, pro-

hibitions are issued against the importation of certain articles. At this time the Secretary of State of the United States replied to the Chilean minister as follows:

DEPARTMENT OF STATE,
Washington, March 13, 1891.

SIR: I have the honor to acknowledge the receipt of your note of the 10th instant, in which you inform me that your Government has prohibited, until further orders, the importation into the Republic of arms and munitions of war of all kinds.

In conveying this information you request me, if possible, to communicate this decree to the custom-houses of the United States in order that the shipment of such articles to Chile may be prevented; and in this relation you state that an agent of the insurgents in Chile has arrived in the city of New York for the purpose of purchasing arms and munitions of war.

The laws of the United States on neutrality, which may be found under Title LXVII of the Revised Statutes, while forbidding many acts to be done in this country which may affect the relations of hostile forces in foreign countries, do not forbid the manufacture and sale of arms or munitions of war. I am therefore at a loss to find any authority for attempting to forbid the sale and shipment of arms and munitions of war in this country, since such sale and shipment are permitted by our law. In this relation it is proper to say that our statutes on this subject are understood to be in conformity with the law of nations, by which the traffic in arms and munitions of war is permitted, subject to the belligerent right of capture and condemnation.

Since your note has directed attention to the subject of neutrality, it should be stated that our laws on that subject are put in force upon application to the courts, which are invested with the power to enforce them and to inflict the penalties prescribed for their violation. Our statutes not only forbid the infringement in this country of the rules of neutrality, but also impose grave penalties for their infraction.

I will inclose a copy of your note to the Secretary of the Treasury and the Attorney-General.

Accept, etc., JAMES G. BLAINE.

(Foreign Relations U. S., 1891, p. 314.)

Opinion of Mr. Sherman.—In a long dispatch to United States Minister Woodford in Spain, November 20, 1897, Secretary of State John Sherman says, among other remarks upon duties of the United States in time of insurrection—

It is to be borne in mind that Spain insists that a state of war does not exist between that Government and the people of Cuba;

that it is engaged in suppressing domestic insurrection that does not give it the right, which it so strenuously denies itself, to insist that a third nation shall award to either party to the struggle the rights of a belligerent or exact from either party the obligations attaching to a condition of belligerency. It can not be denied that the United States Government, whenever there has been brought to its attention the fact or allegation that a suspected military expedition has been set on foot or is about to start from our territories in aid of the insurgents, has promptly used its civil, judicial, and naval forces in prevention and suppression thereof. So far has this extended and so efficient has the United States been in this regard that, acting upon information from the Spanish minister or from the various agencies in the employ of the Spanish legation, vessels have been seized and detained in some instances when investigations showed that they were engaged in a wholly innocent and legitimate traffic. By using its naval and revenue marine in repeated instances to suppress such expeditions, the United States has fulfilled every obligation of a friendly nation. Inasmuch as Spain does not concede, and never has conceded, that a state of war exists in Cuba, the rights and duties of the United States are such as devolve upon a friendly nation toward another in case of an insurrection which does not rise to the dignity of recognized war.

As you are aware, these duties have been the subject of not infrequent diplomatic discussion between the two Governments, and of adjudications in the courts of the United States, as well during the previous ten years' struggle as in the course of the present conflict. The position of the United States was very fully presented by Mr. Fish in his note of April 18, 1874, to Admiral Polo de Bernabe (Foreign Relations of the United States, 1875, pp. 1178 et seq.):

"What one power in such case may not knowingly permit to be done to another power, without violating its international duties, is defined with sufficient accuracy in the statute of 1818, known as the neutrality law of the United States.

"It may not consent to the enlistment within its territorial jurisdiction of naval and military forces intended for the service of the insurrection.

"It may not knowingly permit the fitting out and arming or the increasing or augmenting the force of any ship or vessel within its territorial jurisdiction, with intent that such ship or vessel shall be employed in the service of the insurrection.

"It may not knowingly permit the setting on foot of military expeditions or enterprises to be carried on from its territory against the power with which the insurrection is contending."

Except in the single instance to be hereafter noticed, his excellency the minister of state does not undertake to point out any infractions of these tenets of international obligation so clearly

stated by Mr. Fish. Did any further instance exist the attention of this Government would have been called to it.

With equal clearness, Mr. Fish has stated in the same note the things which a friendly government may do and permit under the circumstances set forth.

"But a friendly government violates no duty of good neighborhood in allowing the free sale of arms and munitions of war to all persons, to insurgents as well as to the regularly constituted authorities, and such arms and munitions, by whichever party purchased, may be carried in its vessels on the high seas without liability to question by any other party. In like manner its vessels may freely carry unarmed passengers, even though known to be insurgents, without thereby rendering the government which permits it liable to a charge of violating its international duties. But if such passengers, on the contrary, should be armed and proceed to the scene of insurrection as an organized body, which might be capable of levying war, they would constitute a hostile expedition which may not be knowingly permitted without a violation of international obligation."

Little can be added to this succinct statement of Mr. Fish. It has been repeatedly affirmed by decisions of our courts, notably by the Supreme Court of the United States. In the case of Wilborg *v.* The United States, 163 U. S. Reports, p. 632, Mr. Chief Justice Fuller repeats, with approval, the charge of the trial court, in which it was said (p. 653):

"It was not a crime or offense against the United States under the neutrality laws of this country for individuals to leave the country with intent to enlist in foreign military service, nor was it an offense against the United States to transport persons out of this country and to land them in foreign countries, when such persons had an intent to enlist in foreign armies; that it was not an offense against the laws of the United States to transport arms, ammunition, and munitions of war from this country to any foreign country, whether they were to be used in war or not, and that it was not an offense against the laws of the United States to transport persons intending to enlist in foreign armies and munitions of war on the same trip. But (he said) that if the persons referred to had combined and organized in this country to go to Cuba and there make war on the Government, and intended when they reached Cuba to join the insurgent army and thus enlist in its service, and the arms were taken along for their use, that would constitute a military expedition, and the transporting of such a body from this country for such a purpose would be an offense against the statute."

These principles sufficiently define the neutral duties of the United States, which have been faithfully observed at great expense and with much care by this Government. (U. S. Foreign Relations, 1898, p. 609.)

Case of the South Portland.—There are many cases in which United States authorities have been asked by states to prevent the sale, carriage, or other dealings in war material when insurrections existed in certain states. Requests have come from both the parent states and the insurgents.

Such reports as the following are not uncommon:

LEGATION OF THE UNITED STATES,
Caracas, September 24, 1892.
(Received September 24.)

Mr. Scruggs reports that the situation remains unchanged, nothing new having occurred, and transmits a request of the Government of Venezuela that the steamer *South Portland*, laden with munitions of war in New York, be prevented from entering Puerto Cabello by the naval forces of the United States.

Replying to the request that the United States naval force interfere to prevent the entrance to a Venezuelan port during insurrection of a private vessel of the United States with contraband, Minister Scruggs reports:

I pointed out that the mere exportation of arms and munitions of war from the United States had never been held an offense against our neutrality laws; that as all the belligerents in Venezuela enjoyed this right equally, none of them could justly complain; that his Government had the right, under the law of nations, to seize contraband of war on its transit to the enemy, and we would not be likely to complain, should this right be exercised in a legitimate and proper manner; but that, as neutrals, we could hardly be expected to employ our naval force to make the blockade of Puerto Cabello effective, nor to police the high seas in the interest of one belligerent against another. (U. S. Foreign Relations, 1892, p. 626.)

English opinion.—The court maintained in the case of the *Helen*, commerce which was lawful for the neutral with either belligerent country before the war is not made by the war unlawful or capable of being prohibited by both or either of the belligerents. (13 Law Times Reports, 305.) What is lawful trade in times of war would certainly be lawful when no war existed and insurgency only existed.

Such opinions do not imply that the foreign state should aid or protect those who engage in such commerce

with a party to a civil conflict. Such trade is liable to be prevented by force within the jurisdiction of the disturbed state.

Belgian opinion.—Regarding the trade in arms and ammunition and other contraband objects, the Government of the King, looking to the strict observance of the duties prescribed by neutrality, does not intervene either to protect or prohibit it. No law prohibiting the exportation of these products of national industry, the trade in question is carried on freely in the country, but outside the territory, at the risks and perils of those who carry it on. (Belgian minister of foreign affairs to Mr. Storer, September 6, 1898; 7 Moore International Law Digest, p. 747.)

Professor Moore's Opinion.—The right of foreigners to supply war materials to those engaged in civil conflict is limited, as Professor Moore states:

From what has been shown it may be argued that, without regard to the recognition or nonrecognition of belligerency, a party to a civil conflict who seeks to prevent, within the national jurisdiction and at the scene of hostilities, the supply of arms and munitions of war to his adversary commits not an act of injury, but an act of self-defense, authorized by the state of hostilities; that, the right to carry on hostilities being admitted, it seems to follow that each party possesses, incidentally, the right to prevent the other from being supplied with the weapons of war; and that any aid or protection given by a foreign government to an individual to enable him with impunity to supply either party with such articles is to that extent an act of intervention in the contest. (7 International Law Digest, p. 752.)

Trade in contraband.—While in time of recognized belligerency either belligerent has a right to seize on the high seas contraband bound for the enemy, this right does not exist in time of an insurrection which has not yet been recognized as a state of war. Yet the nonrecognition of belligerency does not change the character of the act. Citizens of foreign states engaged in the carriage of articles which would be regarded as contraband if belligerency was recognized are liable to the consequences of their act if taken within the jurisdiction of the state where the insurrection exists. In time of recognized belligerency a state is not under obligation to prevent its subjects from engaging in contraband trade. No more would it be under obligation to prevent such

trade at a time when no recognition of belligerency had been granted.

It is equally well established that trade in arms and munitions of war in the time of actual hostilities is at the risk of the one engaged in the trade and may be prevented by either party within national jurisdiction.

Any aid to a revolting party in the carrying out of domestic hostilities would be an unfriendly act to the parent state which the parent state could oppose by such means as were within its power.

Under the circumstances, as presented in Situation VII, a port of State X is in the hand of insurgents.

Strictly speaking, there is no contraband until there is war, but the United States has often put into operation its neutrality laws during a period of insurrection in a foreign state and has admitted its obligation to restrain certain actions on the part of its citizens. The carriage of contraband has never been regarded as a violation of neutrality in the sense that a neutral state must prevent such action, as it is evident that a neutral state could not prevent such action in all instances even if it should regard it as expedient. The penalty for the carriage of contraband is the seizure of the goods by the belligerent. The naval forces of a neutral are under no obligation to assist in enforcing this penalty.

In the case under consideration the authorities of State X may take such action within their own jurisdiction as may be necessary to prevent the entrance of the merchant vessel of the United States.

Conclusion.—The commander of the United States war vessel should decline to interfere to prevent the carriage of goods by a merchant vessel of the United States even though the goods are bound to a port in the hands of an insurgent and he is requested to interfere by the authorities of the parent state.

Situation VIII.

There is war between States X and Y. State Z is neutral. A commander of a war vessel of State X maintains that a private vessel of neutral State Z which has aided State Y by transmitting wireless telegraph messages is liable to capture as guilty of unneutral service. He also maintains that neutral State Z should assume some responsibility for the use of wireless telegraph within its own jurisdiction.

The commander is asked for a brief statement of the restrictions which might well apply to the use of wireless telegraphy in time of war.

Under present conditions, what statement might he make?

Solution.

(*a*) A belligerent may regulate or prohibit the use of wireless telegraph within the area of hostilities.

(*b*) A neutral state should use reasonable care to prevent within its jurisdiction the unneutral use of wireless telegraph.

(*c*) Unneutral use of wireless telegraph on board a vessel makes the vessel liable to the penalty of capture by a belligerent, or to confiscation or sequestration of the apparatus, or of the vessel, or of both by a neutral.

(*d*) A vessel intentionally aiding a belligerent by the use of wireless telegraph is liable to the penalty until the end of the war.

Notes on Situation VIII.

Nature of service.—The usefulness of wireless telegraphy, which a few years ago was problematical, is now amply proven. This was shown in the South African war, some of the German wars in Africa, and in the Russo-Japanese war.

The general principle of wireless telegraphy is based on the fact that the oscillation of an electric spark generates ether waves, usually called, from the discoverer,

Hertzian waves. As these waves were discovered in 1887, it is but natural that no extended international law precedents in regard to their use have yet been established. The Hertzian waves may move to a considerable distance in any direction from the generator. They may by proper apparatus be received at any point within this sphere. The present lack of control of the direction in which the waves may move differentiates the service in this respect from that of wire telegraphy.

There are various systems of transmitting and receiving the Hertzian waves. Certain states have given preference to a single system, while other states permit the use of several systems. The Telefunken system is used in Germany and in the German navy. The same system is receiving favorable consideration in Holland, Norway, and South American States, and also Sweden, and has been the subject of experimental use in some of the British dependencies. In Russia the Popoff system is used. The Rochefort and the Ducretet systems have received support in France. The Marconi system has exclusive rights in Italy and extensive use elsewhere. In the United States the Telefunken, Deforest, and Marconi systems are in use. Certain countries have special systems or variations of the above systems in use. The great diversity in control and in operation shows the need of governmental and international regulation.

Control of submarine cables.—The principles of control as stated in the Naval War College lectures on Submarine Cables in 1901 seems to apply in some respects to wireless telegraphic equipment. It was maintained in regard to submarine cables that, "The right to legislate for this form of property is, therefore, in the power of the state, or in case no legislation has been enacted, the legal control is in the proper department of the government." This position was affirmed by Secretary Fish as early as July 10, 1869, as follows:

> It is not doubted by this Government that the complete control of the whole subject, both of the permission and the regulation of foreign intercourse, is with the Government of the United States, and that, however suitable certain legislation on the part of a

State of the Union may become, in respect to proprietary rights in aid of such enterprises, the entire question of allowance or prohibition of means of foreign intercourse, commercial or political, and of the terms and the conditions of its allowance is under the control of the Government of the United States. (Sen. Doc. 122, p. 65.)

President Grant took practically the same position in his message of December, 1875, and since that time the position has often been reaffirmed. All foreign submarine cables having a terminus in the United States have been landed under a distinct condition that the "executive permission is to be accepted and understood by the company as being subject to any future action of Congress in relation to the whole subject of submarine telegraphy." An opinion of the Attorney-General, in accordance with which the President was entitled to act and to order all the departments of executive character to act, sums up the matter as follows:

The preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to the President. * * * The President has charge of our relations with foreign powers. It is his duty to see that in the exchange of comities among nations we get as much as we give. He ought not to stand by and permit a cable to land on our shores under concessions from a foreign power which does not permit our cables to land on its shores and enjoy there facilities equal to those accorded its cable here. * * * The President is not only the head of the diplomatic service, but Commander in Chief of the Army and Navy. A submarine cable is of inestimable service to the Government in communicating with its officers in the diplomatic and consular service, and in the Army and Navy when abroad. The President should therefore demand that the Government have precedence in the use of the line, and this was done by President Grant in the third point of his message * * * The Executive permission to land a cable is, of course, subject to subsequent Congressional action. The President's authority to control the landing of a foreign cable does not flow from his right to permit it in the sense of granting a franchise, but from his power to prohibit it should he deem it an encroachment on our rights or prejudicial to our interests. The unconditional landing of a foreign cable might be both, and therefore to be prohibited, but a landing under judicious restrictions and conditions might be neither, and therefore to be permitted in the promotion of international intercourse. (22 Opin. Atty. Gen., p. 25.)

In a later decision it was held that—

the same restriction applied to the landing of submarine cables in Cuba in the time of military occupation on the island. (Ibid., p. 515.)

There can, then, be no doubt that for the executive branches of the United States Government the principle of control by the President is established in absence of any legislation to the contrary. (Wilson, Submarine Telegraphic Cables in their International Relations, p. 11.)

Agreement between United States and Germany.—The conditions under which submarine cables are permitted to be laid and operated within United States territory are shown in the following memorandum:

MEMORANDUM.

In the matter of the application of the Deutsch-Atlantische Telegraphen-Gesellschaft of Germany for permission to land on the shores of the United States a submarine telegraph cable, to be laid between Germany and the United States.

The President having duly considered said application, hereby consents that said company may lay, construct, land, maintain, and operate telegraphic lines or cables on the Atlantic coast of the United States, to connect Borkum-Emden, in the Empire of Germany, and the city of New York, touching at the Azores.

It is a condition to the granting of said consent that said company first file with its said application, in the Department of State, its written acceptance of the terms and conditions on which said consent is given, to wit:

I.

That neither the said company, its successors or assigns, nor any cable with which it connects, shall receive from any foreign government exclusive privileges which would prevent the establishment and operation of a cable of an American company in the jurisdiction of such foreign government.

II.

That the company has received no exclusive concessions from any government which would exclude any other company or association, which may be formed in the United States of America, from obtaining a like privilege for landing its cable or cables on the shores of Germany, and connecting such cable or cables with the inland telegraph system of said country.

III.

That the said company shall not consolidate or amalgamate with any other line or combine therewith for the purpose of regulating rates.

IV.

That the company will, in the transmission of official messages, give precedence to messages from and to the Government of the United States of America and of other governments.

V.

That the rates charged to the Government of the United States shall not be greater than those to any other government, and the said rates and those charged to the general public shall never exceed the present telegraphic rates between said counties, and shall be reasonable.

VI.

That the Government of the United States shall be entitled to the same or similar privileges as may by law, regulation, or agreement be granted by said company or its successors or assigns to any other government.

VII.

That the citizens of the United States shall stand on equal footing as regards the transmission of messages over said company's lines with citizens or subjects of Germany or any other country with which said cable may connect.

VIII.

That messages shall have precedence in the following order:

(*a*) Government messages and official messages to the Government.

(*b*) Service messages.

(*c*) General telegraphic messages.

IX.

The said line shall be kept open for daily business, and all messages in the order above be transmitted according to the time of receipt.

X.

That no liability shall be assumed by the Government of the United States by virtue of any censorship which it may exercise over said line in the event of war or civil disturbance.

XI.

That the consent hereby granted shall be subject to any future action by the Congress or by the President, affirming, revoking, or modifying, wholly or in part, the said conditions and terms on which said permission is given. (U. S. Foreign Relations, 1899, p. 311.)

The conditions set forth in this memorandum show that the United States retains full power over cables which are permitted to operate within its jurisdiction. This principle of control would involve censorship over or even discontinuance of the service. The control would also involve some degree of responsibility. It may be reasonable to expect, so far as practicable, a corresponding control of wireless telegraphy. The medium of communication is not the same, but the principles involved are to some extent similar.

Report of Inter-Departmental Board.—The conclusions of the Inter-Departmental Board on wireless telegraphy, made to the President of the United States, July 12, 1904, are:

That the maintenance of a complete coastwise system of wireless telegraphy by the Navy Department is necessary for the efficient and economical management of the fleets of the United States in time of peace and their efficient maneuvering in time of war.

That the best results can be obtained from stations under the jurisdiction of one Department of the Government only, and that representatives of more than one Department should not be quartered at any station.

And finally the Board concludes that the Government must take the necessary steps to regulate the establishment of commercial wireless telegraph stations among the States and between nations. (Report, p. 9.)

Report of General Board, Navy.—Some form of effective Government control of wireless telegraphy seems necessary both for commercial and military reasons. It also seems proper that as in the postal service, and in the telegraph service in certain States, Government employees should be placed in charge of the wireless communication. The General Board, Navy Department of the United States, in a report to the Secretary of the Navy,

May 2, 1904, considered the question of control of wireless telegraph.

The report considers specific points. It states:

2. The questions are:

Whether or not all wireless telegraph stations belonging to the Government on or near the seacoast ought to be under a common control?

If so, which Department of the Government can best exercise the control?

What is necessary in order to control private seacoast wireless telegraph stations?

3. In all this discussion the term "seacoast" includes all wireless telegraph stations capable of communicating with ships at sea, whatever their actual distance inland, and includes the Great Lakes and the insular possessions of the United States, as well as the Atlantic, Gulf, and Pacific coasts.

4. The following facts must, in the opinion of the General Board, form the basis of the decision:

5. The principal defect of wireless telegraphy, the liability to interference, renders some central control indispensable to the integrity and effectiveness of any wireless telegraph station. Without control over the placing of other stations, any wireless telegraph station may be rendered absolutely useless either by accident or design.

6. The control of all wireless telegraph stations belonging to the Government can be accomplished by Executive order. In order to control private stations, general legislation by Congress will be required, both because wireless telegraphy bridges the boundaries between States and because it stretches beyond the territorial limits of the nation.

7. The principal use of wireless telegraphy is now, and long will be, at sea—between ship and ship, or ship and shore. On shore other means of communication always exist, often better, always possible substitutes. The common telegraph or telephone, or the heliograph, permanent or portable, is everywhere available to the soldier or meteorologist. Permanent outlying stations can be connected by submarine cables. Although wireless telegraphy may be an added convenience, on shore it never can be indispensable. But from ships at sea, out of sight of flags or lights, and beyond the sound of guns, the electric wave, projected through space, invisible and inaudible, can alone convey the distant message.

8. In the present state of the science, development and experiment must be carried on largely at sea. We know as yet little of the limitations or possibilities of marine and transmarine communication. The Navy is the only Department of the Government that has facilities for this branch of the work, and, irre-

spective of what is done by other Departments, the Navy must, in its own interest, continue to experiment and to communicate between its ships and the shore.

9. To the Navy, wireless telegraphy is absolutely essential. All the battle ships and larger cruisers, perhaps even torpedo boats, are or will be equipped with it—as foreign navies are—to communicate with each other, as well as with the shore.

10. The Navy has already 20 wireless telegraph stations on the seacoast and proposes to establish no less than 60 more. The Navy has already made arrangements to receive at its stations and to transmit over the land telegraph lines wireless messages from passing merchant vessels. The Army has 2 stations in use in Alaska and 2 others for experimenting, and has considered placing 1 at the Golden Gate on the Pacific coast. The Weather Bureau has 2 stations and proposes to erect 7 more. All these stations, except the 2 in Alaska, which are for communicating with each other, are for the purpose of communicating between ships at sea, or in a few cases outlying islands and the mainland. Several of the Army and Weather Bureau stations interfere, or will interfere, with those of the Navy.

11. From these facts it appears clear that it would be in the interest of all to put the seacoast wireless telegraph stations belonging to the Government under the control of one Department. That control must extend to the determination of sites, and probably to the choice of systems, in order to prevent the several Departments from frustrating one another's efforts. It does not seem to the General Board that there will be much difference of opinion on this question.

* * * * * * *

14. * * *

(1) It is absolutely necessary in time of war that the observers stationed to receive messages from the fleet should be subject to military law—that is, enlisted men of the Navy. Civilian marine observers, however skillful in reporting merchant ships, could not so well be trusted to distinguish the wireless messages of friendly from hostile men-of-war, or to transmit accurately technical naval signals, and could not be trusted at all with the secret signal codes of the Navy. Whoever mans the seacoast stations in time of peace, the Navy must man them in time of war.

(2) Unless the Navy mans the stations in time of peace it will not have the trained force ready to man them in time of war. Practice with instruments on shipboard alone will not suffice. The man to be trusted at a seacoast station in time of war, alert to detect the unexpected, must be familiar with the usual local business in time of peace. The opportunity for training the signal men is no less important than testing the apparatus.

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16. The subject of legislation to control private wireless telegraph stations on the seacoast is of growing importance to the Government because of the increase in the number of them and their liability to interfere, maliciously or accidentally, with the Government's stations. In order to safeguard its own interest, both in peace and war, the Government must have some means to prevent the erection of a private wireless telegraph station within the range of interference of one of its own. It would not be wise, in the opinion of the General Board, for the Government to undertake to manage all the seacoast wireless telegraph business of the country, nor for an industry of such growing commercial utility to be controlled directly by a military branch of the government. The Department of Commerce and Labor, now charged with the administration of the Light-House Service, the Coast Survey, the Inspection of Steamboats, and the jurisdiction over merchant shipping generally, would perhaps be the most natural one to control private wireless telegraph companies. The law should clearly give the Government priority of right and prohibit the erection of any private station without the approval of the Government.

International agreement, 1903.—There was an international agreement on certain points between several states at a convention held at Berlin August 4–13, 1903. Austria, France, Germany, Hungary, Russia, Spain, and the United States signed the protocol as follows:

FINAL PROTOCOL.

The delegations to the preliminary conference concerning wireless telegraphy designated below:

Germany, Austria, Spain, the United States of America, France, Hungary, Russia, are unanimous in proposing to their Governments to examine the following general bases for an international convention:

ARTICLE 1.

Exchange of correspondence between ships at sea and coastwise wireless telegraph station opened to general telegraphic service is subject to the following rules:

SEC. 1. All stations whose field of action extends to the sea are called coastwise stations.

SEC. 2. Coastwise stations are required to receive and transmit telegrams originating on ships at sea without distinction as to the systems of wireless telegraphy employed by said ships.

SEC. 3. The contracting states make public the technical points of nature to facilitate and accelerate communication between coastwise stations and ships at sea.

However, each of the contracting Governments can authorize stations situated in its territory, under such conditions as it may deem proper, to utilize several installations or special arrangements.

SEC. 4. The contracting states declare their intention to adopt, in order to establish the tariffs applicable to telegraphic service between ships at sea and the international telegraphic system, the following bases:

The total charge to collect for this service is established by the word. It comprises—

(*a*) The charge for transmission over the lines of the telegraphic system of which the amount is that fixed by the international telegraph regulation in force attached to the St. Petersburg Convention.

(*b*) The charge pertaining to the marine transmission.

The latter is, as the former, fixed by the number of words, this number of words being counted according to the international telegraphic rule as indicated in the paragraph above (*a*).

It comprises—

1°. A charge called "charge of the coastwise station," which goes to said station.

2°. A charge called "charge of the ship," which goes to the station installed on the ship.

The charge of the coastwise station is subject to the approval of the state on whose territory it is established, and that of the ship to the approval of the state whose flag the ship carries.

Each of the two charges should be fixed on the basis of equitable renumeration for the telegraphic work.

ARTICLE II.

A regulation which will be attached to the proposed convention will establish rules for the exchange of communications between coastwise stations and those placed on board ship.

The prescriptions of this regulation may at any time be modified by common agreement by the administration of the contracting Governments.

ARTICLE III.

The rules of the telegraphic convention of St. Petersburg are applicable to transmission by wireless telegraphy in so far as they are not contrary to those of the proposed convention.

ARTICLE IV.

Wireless telegraph stations should, unless practically impossible, give priority to calls for help received from ships at sea.

ARTICLE V.

The service of operating wireless telegraph stations should be organized, as far as possible, in a manner not to interfere with the service of other stations.

ARTICLE VI.

Contracting Governments reserve to themselves, respectively, the right to make special arrangements themselves, having for their object to oblige the companies operating wireless telegraph stations in their territories to observe, in all their other stations, the prescriptions of the proposed convention.

ARTICLE VII.

The prescriptions of the proposed convention are not applicable to the wireless telegraph stations of the state not open to general telegraphic service, save in that which concerns the clauses which Articles IV and V are intended to cover.

ARTICLE VIII.

Countries which have not joined the proposed convention will be admitted at their request.

Done at Berlin August 13, 1903.

(Then follow signatures of delegates for Germany, Austria, Spain, the United States of America, France, Hungary, Russia.)

DECLARATION OF THE DELEGATION OF GREAT BRITAIN.

While engaging itself to submit the above bases to the examination of its Government, the British delegation declares that, in view of the situation in which wireless telegraphy finds itself in the Unted Kingdom, this delegation ought to maintain a general reserve. This reserve relates especially to section 2 of the first article and to the application of the rules of Article V to the stations indicated in Article VII.

Done at Berlin August 13, 1903.

(Signatures follow.)

DECLARATION OF THE ITALIAN DELEGATION.

The delegation of Italy, while agreeing to submit to the examination of its Government the propositions contained in the final protocol of the conference, ought, agreeably with the declarations made by its members in the several meetings, to make on account of the Government the following reservations:

ART. I, SEC. 2. It would accept the proposed text only on condition of the following addition being made: "Provided, that all these systems give a known guarantee for good working in re-

ciprocal correspondence with respect to the range, to the perfection of the organization and to the surety of communications."

ART. I, SEC. 3. It can not accept the first paragraph of this section because in the agreements concluded with M. Marconi the Government engages to keep the details of the installations secret.

ART. VI. It can not accept the text of this article, and it should limit itself to the declaration on the part of its Government that it will endeavor to introduce in the agreements stipulated with M. Marconi some modifications in the desired direction.

Done at Berlin August 13, 1905.

(Signatures follow.)

By Article III of this protocol the rules of the St. Petersburg convention are adopted so far as consistent.

Berlin Wireless Convention, 1906.—The following states are parties to the International Wireless Telegraph Convention concluded at Berlin, November 3, 1906: Germany, the United States of America, Argentina, Austria-Hungary, Belgium, Brazil, Bulgaria, Chile, Denmark, Spain, France, Great Britain, Greece, Italy, Japan, Mexico, Monaco, Norway, the Netherlands, Persia, Portugal, Roumania, Russia, Sweden, Turkey, and Uruguay.

ARTICLE 1.

The High Contracting Parties undertake to apply the provisions of the present Convention at all radiotelegraph stations—coast station and ship stations—open for the service of public correspondence between the land and ships at sea which are established or worked by the Contracting Parties.

They undertake, moreover, to impose the observance of these provisions upon private enterprises authorized either to establish or work radiotelegraph coast stations open for the service of public correspondence between the land and ships at sea, or to establish or work radiotelegraph stations, whether open for public correspondence or not, on board ships which carry their flag.

ARTICLE 2.

The term "Coast Station" means any radiotelegraph station which is established on land or on board a ship permanently moored, and which is used for the exchange of correspondence with ships at sea.

The term "Ship Station" means any radiotelegraph station established on board a ship which is not permanently moored.

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ARTICLE 16.

Governments which have not taken part in the present Convention shall be allowed to adhere thereto on their request.

This adhesion shall be notified through the diplomatic channel to the contracting Government under whose auspices the last Conference has been held, and by it to all the others.

Adhesion involves as a matter of right of acceptance of all the clauses of the present Convention and admission to all the advantages stipulated therein.

ARTICLE 17.

The provisions of Articles 1, 2, 3, 5, 6, 7, 8, 11, 12, and 17 of the International Telegraph Convention of St. Petersburg of the 10/22 July 1875 are applicable to international radiotelegraphy.[a]

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[a] Extract from the International Telegraph Convention signed at St. Petersburg, July 10/22, 1875:

ARTICLE 1.

The High Contracting Parties concede to all persons the right to correspond by means of the international telegraphs.

ARTICLE 2.

They bind themselves to take all the necessary measures for the purpose of insuring the secrecy of the correspondence and its safe transmission.

ARTICLE 3.

They declare, nevertheless, that they accept no responsibility as regards the international telegraph service.

ARTICLE 5.

Telegrams are classed in three categories:

1. State telegrams: those emanating from the head of the Nation, the Ministers, the Commander-in-Chief of the Army and Naval forces, and the Diplomatic or Consular Agents of the Contracting Governments, as well as the answers to such telegrams.

2. Service telegrams: those which emanate from the Managements of the Telegraph Service of the Contracting States and which relate either to the international telegraph service or to subjects of public interest determined jointly by such Managements.

3. Private telegrams.

In the transmission, the State telegrams shall have precedence over other telegrams.

ARTICLE 6.

State telegrams and service telegrams may be issued in secret language, in any communications.

Private telegrams may be exchanged in secret language between two States which admit of this mode of correspondence.

The States which do not admit of private telegrams in secret language upon the expedition or arrival of the same, shall allow them to pass in transit, except in the case of suspension defined in article 8.

ARTICLE 21.

The High Contracting Parties retain their full liberty concerning radiotelegraph installations not covered by Article I, and, in particular, concerning naval and military installations, which are subject only to the obligation of Articles 8 and 9 of the present Convention.

Nevertheless, when these installations carry on public correspondence, they shall conform, for the performance of this service, to the stipulations of the Regulations so far as concerns the manner of transmission and the accounting.

ARTICLE 22.

The present Convention shall come into operation on and from the 1st of July, 1908, and shall remain in force for an indefinite period, or until the expiration of a year from the date of denunciation.

Denunciation only takes effect as regards the Government in whose name it is made. The Convention shall remain in force as regards the other Contracting Parties.

General control of messages.—The Supreme Court of the United States stated in 1886 that—

A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce

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ARTICLE 7.

The High Contracting Parties reserve the right to stop the transmission of any private telegram which may appear dangerous to the safety of the State or which may be contrary to the laws of the country, to public order or good morals.

ARTICLE 8.

Each Government also reserves the right to suspend the international telegraph service for an indefinite period, if deemed necessary by it, either generally, or only over certain lines and for certain classes of correspondence, of which such Government shall immediately notify all the other Contracting Governments.

ARTICLE 11.

Telegrams relating to the international telegraph service of the Contracting States shall be transmitted free of charge over the entire systems of such States.

ARTICLE 12.

The High Contracting Parties shall render accounts to one another of the charges collected by each of them.

ARTICLE 17.

The High Contracting Parties reserve respectively the right to enter among themselves into special arrangements of any kind with regard to points of the service which do not interest the States generally.

and their business is commerce itself. They do their transportation in different ways and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits. (Telegraph Co. *v.* Texas, 105 U. S. Supreme Court Reports, 460.)

The government must necessarily control commerce, and it is thus provided according to the fundamental law. Wireless telegraphy would be a matter of commerce and accordingly properly subject to governmental control. Such control has been quite regularly exercised in regard to telegraphy by means of wires. It is generally recognized that government control may be expedient both from commercial and military reasons. Austria, France, Germany, Hungary, Russia, and Spain control their telegraph lines. If such control is, and it seems to be, both legal and expedient, then government control of wireless telegraphy should be assumed.

In the consideration of wireless telegraphy certain complications arise. The analogy to ordinary telegraphy is not complete. While a message may be sent from a given point, it will not as in the ordinary telegraphy move only in a direction determined by the sender. In ordinary telegraphy the wire upon which the message travels is tangible and may be cut if it can be reached. The destination of the message may be inferred if the course of the wire is known. The apparatus of the ordinary telegraph is practically stationary, even though in land warfare a certain degree of mobility is secured at times. This is, however, very limited and may not extend to maritime movements. There must be wire connection between the sending and receiving stations. Their locations may be known, and hence the jurisdiction may be determined. The transmission of dispatches may thus be controlled. Most governments have maintained some control over land telegraphy and a general control over submarine lines, even when connecting with a foreign state. It is generally admitted that each government may when necessary in war assume control of the wire telegraphy. The uncontrolled use of wireless telegraphy would not long be tolerated by any government which desired to

protect itself. This is particularly the case at present because by present methods the sending of messages from one station may interfere with similar work in another.

Control of telegraph in time of war.—The general principles governing the relations of belligerents and neutral are not changed by the introduction of wireless telegraphy. The burden of the conduct of the war should not be thrown upon neutrals, nor should neutrals participate in the war.

From the nature of wireless messages, they may reach instruments within neutral jurisdiction without any guilty participation on the part of those within neutral jurisdiction. There is no means by which the neutral can prevent the receipt of such messages other than by rendering the station useless. Such action would not be similar to that of sealing a cable connecting with belligerent territory, for the same wireless instrument may receive messages from any source and is not, like the cable, limited to a connecting station easily determinable. It would not be reasonable to demand that a neutral should close a station simply because it might receive dispatches from a belligerent. Nor would it always be possible for a given station to determine the character of a message which it might receive, because its source might be uncertain, or if the source were known the message itself might be apparently innocent in character. The possibility of neutral control of wireless messages within neutral jurisdiction would be quite different from that of control of wire messages.

In the consideration of the treatment of submarine cables in time of war the main question was one of interruption of a material connection between two points. In wireless telegraphy interruption may take place whether intentional or unintentional without possibility of fixing clearly the responsibility for the interruption. Interruption or interference may be no more than temporary and probably could not be permanent. The message transmitted may not be sent in a single direction or to a single point.

The fifth section of the Brazilian neutrality proclamation of 1898 states:

> That it is prohibited, citizens or aliens residing in Brazil, to announce by telegraph the departure or near arrival of any ship, merchant or war, of the belligerents or to give to them any order, instructions, or warnings, with the purpose of prejudicing the enemy.

The last clause of this prohibition is of such a character as to render its enforcement difficult, because it would by implication make necessary that hostile intent on the part of the person dispatching the message should be proved. Neutrality does not consist simply in absence of hostile intent or absence of "purpose of prejudicing the enemy." The quality of the act determines its character, and even though there may be no "purpose of prejudicing the enemy," an act may prejudice the enemy. The Treaty of Washington maintained that "due diligence" should be exercised in order that a neutral might not injure a belligerent. The general doctrine of neutrality imposes the obligation upon the neutral state that it shall be of neither party. If the last clause were omitted from the section of the Brazilian proclamation it would be more effective.

Further, it may be said that the prohibition applies to persons resident in Brazil only, if a strict interpretation is to be given to its first clause. It does not prohibit the use of the means of communication for the purposes specified, but prohibits certain persons from using the telegraph for certain purposes. It would apparently leave the telegraph open to the officers of vessels of either belligerent if they chanced to be in a harbor of Brazil, for they certainly could not be brought under the category of "citizens or aliens residing in Brazil" against whom prohibition runs. The Brazilian proclamation of 1898 is, however, indicative of an early attempt of a neutral to regulate the use of the telegraph in time of war.

It is unquestionable that a single message sent from a neutral port may under certain circumstances be of greater service to a belligerent than a vessel equipped

within and sent from the same port to a belligerent. With the introduction of wireless telegraphy the possibility of use of a wireless station within neutral jurisdiction for belligerent purposes is increased. The method of control is complicated from the fact that wires are not necessary and direct evidence of transmission of messages is not easily obtainable.

In 1898, during the Sanish-American war, the British Government declared that it was "not at liberty to comply with the proposal of the Government of the United States" to allow an American company to land a new cable to connect Manila and Hongkong. This decision has received general approval. If permission to establish a neutral terminal for a cable connecting with a belligerent should be refused, then similarly permission to establish a wireless station should be refused. The fact that the wireless station was within the Russian consulate at Chifu did not make the station at that point set up mainly for war purposes permissible.

The Dutch East Indian authorities during the Russo-Japanese war of 1904–5 made regulations for the refusal at certain stations of telegrams—

the contents of which are unintelligible to the Dutch officials, or telegrams regarding the movements of ships or troops and which are of interest to the belligerent powers—Russia and Japan.

Telegrams in a language agreed upon, the words of which are taken from a commercial or other code, may be admitted, provided the code made use of is submitted to the Dutch officials, and that the text when translated into open language can cause no inconvenience.

Sir John Macdonell, writing in July, 1904, says:

The Institut de Droit International in 1879 adopted a resolution that in time of war cables connecting neutral countries were inviolable. At its meeting in Brussels the Institut passed a series of resolutions which probably express the general understanding as to what is right and proper. After reaffirming the inviolability of cables connecting neutral territories, the Institut added:

"Le câble reliant les territoires de deux belligérants ou deux parties du territoire d'un des belligérants peut être coupé partout, excepté dans la mer territoriale et dans les eaux neutralisées dépendant d'un territoire neutre.

"Le câble reliant un territoire neutre au territoire d'un des belligérants ne peut en aucun cas être coupé dans la mer territoriale ou dans les eaux neutralisées dépendant d'un territoire neutre. En haute mer, ce câble ne peut être coupé que s'il y a blocus effectif et dans les limites de la ligne du blocus, sauf rétablissement du câble dans le plus bref délai possible. Ce câble peut toujours être coupé sur le territoire et dans la mer territoriale dépendant d'un territoire ennemi jusqu'à une distance de trois milles marine de la baisse de basse-marée."

Few of those who discuss the subject dwell sufficiently upon the differences between contraband or quasi-contraband and vessels conveying the same and telegrams and submarine cables. Telegraphic communications may be called quasi-contraband. But you do not seize a vessel because it *may* be carrying contraband; you do not destroy it if it does; you do not confiscate it if the owner has acted innocently. Transmitting messages to belligerents may be likened to breaking a blockade. But the analogy is faint. You do not destroy vessels which may break it; you do not capture them, unless the blockade is effective. In a maritime war a cable is something sui generis. A belligerent can not exercise over it any right similar to that of search; it may be an instrument of war much more important than a cargo of contraband or a blockade runner; the fact to be recognized is that he may be safe only if he cuts it. The hesitation of States unable to foresee circumstances in which interruption to cable communications might be vital to them is natural. Looking to what may hang upon telegraphic communication—transports intercepted, a fleet destroyed, the fate of a campaign affected—it is too much to expect belligerents always to keep within the four corners of the rules which I have quoted. There will be circumstances, it may be anticipated, in which they will not suffer, if they can help it, a telegraphic cable, no matter who is the owner or what are its termini, to be used to their detriment. To whatever rules they assent will probably be added the sacramental formula, "So far as circumstances permit." (56 The Nineteenth Century, p. 148, International Questions and the Present War.)

Liability of vessels transmitting messages. — The Japanese Regulations Governing Captures at Sea, 1904, give a general list of vessels liable to capture:

ART. XXXVII. Any vessel that comes under one of the following categories shall be captured, no matter of what national character it is:

1. Vessels that carry persons, papers, or goods that are contraband of war.

2. Vessels that carry no ship's papers, or have willfully mutilated or thrown them away, or hidden them, or that produce false papers.

3. Vessels that have violated a blockade.

4. Vessels that are deemed to have been fitted out for the enemy's military service.

5. Vessels that engage in scouting or carry information in the interest of the enemy, or are deemed clearly guilty of any other act to assist the enemy.

6. Vessels that oppose visitation or search.

7. Vessels voyaging under the convoy of an enemy's man-of-war.

Later these regulations state:

ART. XLVI. Vessels that are recognized to have been fitted out for the enemy for military purposes, and the goods belonging to the owners of such vessels, shall be confiscated.

ART. XLVII. Vessels ascertained to have scouted or carried information to give benefit to the enemy or to have done any other acts to assist him, and all goods belonging to the owners of such vessels, shall be confiscated.

Section 5 of Article XXXVII makes liable to capture, regardless of nationality, "Vessels that engage in scouting or carrying information in the interest of the enemy, or are deemed clearly guilty of any other act to assist the enemy," and Article XLVII makes such vessels liable to confiscation. These regulations would certainly apply to vessels engaged in transmitting wireless messages of a character to assist the enemy. Such vessels would then be liable to capture and confiscation as would the portion of the cargo belonging to the owners of the vessel, together with the apparatus.

Wireless telegraphy at Chifu.—One of the cases of use of wireless telegraphy during war to which attention has been particularly given is that of the use of the station at Chifu during the Russo-Japanese war. The station at Chifu was within the grounds of the Russian consulate, which, according to the practice in China, was entitled to the right of extraterritoriality. The station communicated particularly with Port Arthur and was apparently mainly used for war purposes.

Professor Woolsey says:

Is the toleration of this practice by China an unneutral act?

Precedent or analogy and reason are the lights to guide us in such an inquiry as this. Now the closest analogy is to be found in the international status, during war, of the world's submarine cable system. This, in great part, is equally out of a belligerent's reach; too deep in the sea to be grappled, it equally binds belligerent and neutral together. There is an international agreement concerning submarine cables, but this provides only for their protection in normal times. Article XV reads: "It is understood that the stipulations of this Convention shall in no wise affect the liberty of action of belligerents." What liberty of action does the belligerent claim? Here the only question in dispute relates to the right to cut a neutral-owned cable running between hostile and neutral points beyond the three-mile limit of the neutral state. But this does not bear upon the problem of the wireless, for the new method has no tangible apparatus except at the terminal points, which are by our supposition, the one hostile, the other neutral. As for the cable end in neutral waters or landed on neutral soil, it is absolutely beyond the reach of the belligerent. Though not subject to force, is it not subject to be sealed on demand of a belligerent on the ground of neutral obligation? In other words, is the neutral state bound to prevent one belligerent from using freely for all purposes a cable landed within the former's jurisdiction and which the other belligerent is unable to interrupt?

There seems to be a disposition to impose this burden upon the neutral. Yet to do so is surely at variance with the entire theory of neutral obligation hitherto recognized. To carry hostile dispatches, to serve as a belligerent transport, for instance, are unneutral services on the part of the neutral individual, punished by confiscation of the vehicle of offense. But it is the belligerent, not the neutral, by existing usage, who bears the onus of prevention. The neutral is bound to prevent the use of his territory as a base of operations, to forbid the fitting out of enemy ships of war in his ports, but not to restrain enemy's dispatches or diplomatic agents or financial agents, all having, it may be, a very direct influence upon the conduct of war. The distinction is between direct military preparation on neutral soil, like an armed expedition, and military news or orders, a difference as wide as the poles. Moreover, if the neutral is held bound to prevent a belligerent's use of a submarine cable between the two—already in established use—or to allow it only under censorship, is he not equally bound to limit the belligerent's use of a land telegraph line establishing similar communication, and would not neutral censorship of belligerent mails be a duty also? If the established and safe principle be abandoned, that neutral com-

merce and communications are to be as little interfered with as the needs of war allow, with a presumption in favor of greater rather than less exemption, are we not launched on a path of neutral obligation which speedily and necessarily leads us to an absurd and impossible standard? (Wireless Telegraphy in War, 14 Yale Law Journal, 248.)

Further, Professor Woolsey says of the wireless at Chifu:

If set up and in commercial use before the war, it would be very hard to stop its use—as being an unneutral service—after Port Arthur was beleaguered. But it was not so set up. On the contrary, the wireless connection was devised as the only available means of enabling Port Arthur to communicate with St. Petersburg. By it news was sent out and orders returned. It had especial military value, and no other value. Professor Lawrence states that the wireless service was abolished by China in August, but this, I am informed, is an error. Russia nearly to the end was able to impose her will, in this, as in some other particulars, upon the Chinese authorities. Nevertheless, in the light of reason and by the force of analogy, China should have forbidden this use of her soil to the belligerents from the first. By permitting it, she has committed a breach of neutrality to the detriment of Japan. (Ibid, p. 251.)

Wireless telegraphy as a news-gathering agency.—The words of the correspondent of *The Times* (London), who conducted the work of the wireless in the Russo-Japanese war, are very suggestive. He says, in part:

It was my lot to be intrusted with the system by which *The Times* was able on many occasions to publish messages from points of vantage which were not accessible to the representatives of any other journal in the world. This has now come to an end. A combination of adverse circumstances, over which it has no control, has made it necessary for *The Times* to discontinue its wireless service. Therefore, as wireless telegraphy, as a journalistic adjunct in the operations of war, has probably been used under my direction for the first and last time, it may be interesting to the reading public to note the circumstances under which *The Times* enterprise was conducted, the success which it attained, and the ultimate reason of its failure.

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Before I left England I determined in my own mind that the naval campaign would work out very much as the last few months have proved—that is, I expected that the main interest for the first six months would center in and about the Yellow

Sea and the Gulf of Pe-chi-li. This being the case, the existence of a British possession, situated as is Wei-hai-wei, and connected directly with the land cable service, stood out alone as the spot most suited for a receiving station. I therefore decided upon Wei-hai-wei, although considerable pressure was brought on me to establish the station elsewhere.

The system was brought to working order, when the correspondent says:

On returning to Wei-hai-wei I was faced with the announcement that the British Admiralty at Hongkong had classed our station as a breach of neutrality and had forbidden the navy to have anything to do with us on any condition. I was also led to understand that the home authorities were seriously contemplating an order which would render Wei-hai-wei impossible for us as a base. As soon as the difficulty was presented to me I stated the whole case to the commissioner at Wei-hai-wei, with the result that this officer was satisfied that he could allow the station to remain without embroiling himself in difficulties with either of the belligerents.

Late in March of 1904 the correspondent says:

Our apparatus was now working so well that we were beginning to make other uses of it than merely for transmitting news from the theater of the sea operations. We were now able to receive both Russian and Japanese messages. These messages of course came in cipher, and, as we possessed no key, it was impossible to make any improper uses of messages thus received, but we could easily recognize the difference in the system employed, and by this means—and here another very important thing in favor of our system was proved—we were able, approximately, to tell the distance we were from the various ships. Moreover, our operator, who was extremely expert, began to recognize the notes of various ships; that is to say, he could tell if a Russian ship was at sea by listening for the answering communication from the shore. He could also detect whether the Japanese messages were being transmitted by relay to the naval base or whether the fleet itself was at sea. This of course was to us possibly of more value than if we had been able to decipher the actual messages sent, and during the period that the *Haimun* was in operation during April our most successful issues resulted from a careful listening for the wireless telegraphy of the opposing fleets. We listened, and came to conclusions which invariably correctly guided us in our movements. For instance, if for a space of six hours on end the Japanese were absolutely silent we knew that Togo had taken to the sea, for invariably when he entered upon some enterprise for the time being all wireless

communication ceased. This being the case, we knew exactly what course to steer, but even at this period we had not fully realized how successfully our system had been installed.

In regard to the use of the apparatus, the correspondent says:

It may be readily understood that we were very careful not to use our wireless telegraphy until the battle ships themselves were engaged with the Port Arthur batteries. The reason for this is obvious. If we had commenced to send news of the position of the rival fleets, we should have at once interfered with the wireless telegraphy of both belligerents. This would certainly have been an unfriendly act, but, although we did not use our own instrument for sending, we listened attentively. The Russians were hard at work. They were just repeating the alphabet over and over again in order to "queer" the Japanese recording instrument. In fact, I am not sure, it was not the constant use made by the Russians of their shore stations that prevented Togo from coming up in time to catch Makaroff's squadron outside.

There is some discrepancy in the times given when the Japanese decoy squadron sent its messages to Togo and when Makaroff decided that he was too far out at sea, and reshaped his course towards Port Arthur. It was only when the Russians stopped their "queering" process in order to receive a message from the *Bayan* that the Japanese Second Class Cruiser Squadron was able to get an interval in which to send its all important message. We received both messages, the Japanese, of course, being in their own private cipher, that from the *Bayan* being half in cipher with a few words in French and signed "B. A." But when once Togo had hoisted his fighting flag and sailed in under the guns of Port Arthur we felt that we were justified in sending just a short message, and so at 9.15 we sent a brief report from within seven miles of Port Arthur, which furnishes the first record of a wireless message reporting a naval engagement being sent direct from the scene of operations to the office of the journal which was to give it to the public.

We were now working so well that there was no necessity for us to return to Wei-hai-wei. Later in the evening when the Japanese had finished sending messages, we were able to send fuller reports of the day's fighting as we steered a course for Chinampo. It had so happened that early in the morning the British sloop *Espiegle*, returning after wintering at Niuchwang, saw part of the operations. She arrived in Wei-hai-wei late in the afternoon and she gave to several correspondents who were stationed at the British port some news of the engagement. This was the first news other than that sent via St. Petersburg that

arrived in Europe, with the exception of the short message sent by us. I just mention this to show that by means of our wireless system we saved eight hours, even though the unlucky chance was against us that the *Espiegle* happened to be passing at that particular time.

The use of the wireless system by *The Times* correspondent on the *Haimun* was soon after put under restrictions by both belligerents, and the correspondent concludes his account by saying:

I maintain that *The Times* has amply demonstrated the value and possibilities of wireless telegraphy in conjunction with journalistic enterprise; in fact, I am inclined to think that it has demonstrated its uses too well and that the success of the system has assisted in its downfall. Moreover, I am convinced that it will ultimately prove that *The Times* has been the first and last journal to use wireless telegraphy to report naval warfare. Although I am positive that in our hands the system was always put to proper uses, yet the possibilities and the dangers are so great that in future the use of all wireless communications during military and naval operations will be controlled by international law. (*The Times*, London, August 27, 1904.)

On April 15, 1904, the Russian ambassador sent to Secretary Hay the following communication:

I am instructed by my Government, in order to avoid every possible misunderstanding, to inform your excellency that the lieutenant of His Imperial Majesty in the Far East has just made the following declaration:

"In case neutral vessels, having on board correspondents who may communicate war news to the enemy by means of improved apparatus not yet provided for by existing conventions, should be arrested off the coast of Kwantung or within the zone of operations of the Russian fleet, such correspondents shall be regarded as spies, and the vessels provided with wireless telegraph apparatus shall be seized as lawful prize."

In reply to the communication, on the same date, Secretary Hay said:

In taking note of this declaration the Government of the United States does not waive any right it may have in international law in the case of any American citizen who may be arrested or any American vessel that may be seized under it. (U. S. Foreign Relations, 1904, p. 729.)

The British version does not seem to agree with the American. Lawrence mentions this and refers to proper penalties for use of wireless telegraph in forwarding war news:

On April 20, Earl Percy, the under-secretary of state for foreign affairs, in answer to a question in the House of Commons, gave an account of Admiral Alexeiff's order, which differed by a very important word from the American version. He spoke of "correspondents who are communicating information to the enemy;" whereas the phrase in the Washington telegram ran "correspondents who may communicate news to the enemy." There is all the difference in the world between being in a position to do an act and actually doing it. If I am left alone in my neighbor's dining room, I may steal his spoons; but it would be very hard if that fact alone secured my condemnation on a charge of larceny. But let us suppose for a moment that information is actually communicated to the enemy. Then, without reference to espionage, Russia has ample means of punishing any neutral, whether newspaper correspondent or not, who sends to the Japanese from the theater of hostilities news of the dispositions of the Russian fleet. The law of unneutral service applies to him. He is in the same position as if he had carried a dispatch for the enemy, or signaled between two of his squadrons. His ship and apparatus are justly confiscate, together with all cargo that belongs to him or to the owner of the vessel. These severities might surely be deemed sufficient, even if there had been an actual transmission of intelligence direct to the Japanese commanders. (Lawrence, War and Neutrality in the Far East, 2d ed., p. 85.)

The translation as appears in the clause of the Washington telegram cited by Professor Lawrence does not mention the important reservation of the American version, that the prohibition relates to a specific kind of news, viz, *war* news.[a]

[a] The original French text as communicated by the Russian representatives to foreign states was as follows:

"Je suis chargé par mon Gouvernement, afin d'éviter tout malentendu possible, de communiquer à Votre Excellence que le Lieutenant de Sa Majesté Impériale en Extrême Orient vient de faire la déclaration suivante:

"Dans le cas où des vapeurs neutres, ayant à bord des correspondants qui communiqueraient à l'ennemi des nouvelles de guerre au moyen d'appareils perfectionnés n'étant pas encore prévus par les conventions existantes,—seraient arrêtés auprès de la côte du Kuantoung ou dans la zone des opérations de la flotte russe,—les correspondants seront envisagés comme espions et les vapeurs, munis d'appareils de télégraphie sans fil,—saisis en qualité de prise de guerre."

According to Scholz, solicitor for the German post-office, the following principle might be laid down in regard to the use of wireless telegraphy:

A belligerent has the right to prohibit, within the zone of hostilities to be defined by him and publicly announced, the dissemination of information as to the whereabouts and movements of his war and merchant vessels, and other warlike measures, by means of wireless telegraphy on board neutral vessels. Violations whereby facts requiring secrecy are divulged with the knowledge or as the result of the negligence of the captain of the ship entail capture and condemnation of the ship, independently of the fact whether the ship intended to render aid to the hostile party. Capture is permissible only within the zone of hostilities, but there during the entire period of the war.

If the transmission by wireless telegraphy is combined with acquisition of the information under the aggravating circumstances of espionage, the guilty persons are subject to the punishment provided for this offense. (Drahtlose Telegraphie und Neutralität, p. 45.)

Of the restriction of the use of wireless equipment by news-gatherers to a given area, Professor Woolsey says:

A restriction as to the locality within which the wireless system of news gathering might operate must also be mutually agreed on by the belligerents, to be of value, unless control of the sea lies absolutely in the hands of one of them. In any case, if respected, this restriction would make it impossible to get anything of value. While if not respected—and could flesh and blood withstand the temptation—there comes about friction, coercion, the need of constant surveillance, leakage of dangerous information.

By process of exclusion we reason, therefore, that news-gathering by sea, with the aid of wireless, is of such a nature as to be inadmissible in warfare, and to require entire prohibition under penalty of confiscation. It is a service bearing an analogy to the dispatch boat, the submarine cable, and the war correspondent, in peculiar combination. The dispatch boat is guilty of unneutral service in behalf of one combatant and can be confiscated by the other; the submarine cable can be cut or worked at the belligerent end under censorship; the war correspondent, by universal usage, is only allowed to accompany an army subject to strict regulations. The wireless news-gatherer, combining the dangerous qualities of all three, should not be permitted at all. (Wireless Telegraphy in War, 14 Yale Law Journal, p. 254.)

Opinions as to wireless service.—The wireless systems are not yet fully perfected. Certain systems have been

exclusively adopted for a period of years in some states. The relations of one method of transmission to another are not yet fully understood. A private individual may possess an equipment with which he may transmit for others messages of great importance, or receive or interrupt government messages of great importance.

It is evident that it may not always be possible to tell the source, the destination, or the significance of a wireless message. The attempt to class such messages under some theory of contraband or violation of blockade would lead to conclusions which it would be difficult to sustain by logical processes.

In military operations wireless telegraphy has, since the South African war, become more and more an established means of communication. By it, different portions of the forces can keep in communication with each other or with headquarters without the danger that wires may be cut and while moving from place to place.

The importance and use of submarine cables in maritime warfare is materially affected by the introduction of the system of wireless telegraphy. The regulations which were growing up in regard to the use of cables cannot in all respects be extended to cover the use of wireless communication.

Many neutral vessels are now equipped with wireless apparatus. Neutral ships are permitted with few limitations to navigate freely. The range of wireless transmission is so extensive that it may usually pass beyond the possible area of belligerent operations over which the belligerent has control. The neutral can in an apparently innocent manner transmit information to a belligerent and may receive certain valuable information without being open to criticism. Unlike messages transmitted by wires, the source and destination of wireless messages are not easily discoverable. Guilt is not easily fixed.

Thonier speaks of the possibility of introducing the principle applicable to contraband, saying:

La récente invention de la télégraphie sans fil va rendre souvent inutile pour le belligérant la destruction des câbles qui relient entre les différents points du territoire ennemi ou le territoire

ennemi et les pays neutres. La situation créée par ce nouveau mode de communication est sans analogue et nécessite, de toute urgence, l'établissement d'une réglementation particulière, afin de déterminer les limites dans lesquelles peut s'exercer les droits des belligérants d'interdire aux neutres certains agissements préjudiciables.

* * * * * * *

Il paraît d'abord possible d'assimiler les appareils de télégraphie sans fil à des articles de contrebande, mais la ressemblance n'est qu'apparente. Le motif qui pousse le belligérant à capturer les marchandises prohibées est la certitude qu'elles auront entre les mains de l'ennemi une destination hostile, en raison de leur nature et de leur destination. La contrebande n'est de quelque utilité à celui-ci qu'autant qu'il l'a en sa possession. Tel n'est pas le cas des appareils de télégraphie sans fil placés à bord des navires neutres. Ils sont utilisés indirectement par l'ennemi, sans passer par ses mains, sans parvenir même à son territoire, sans perdre leur caractère de propriété neutre et en continuant à faire partie intégrante de l'armement du navire neutre.

Le caractère illicite de ces bâtiments neutres ne peut même pas être déterminé par leur direction ennemie, qui constitue un critérium absolument insuffisant parce que contradictoire et variable. Tantôt, en effet, la direction ennemie est suivie dans le but d'aider l'adversaire à renouer ses communications interrompues, tantôt elle cache l'intention nuisible pour ce même adversaire d'annoncer au monde les mouvements de ses escadres ou de ses troupes et d'intercepter ses dépêches confidentielles.

Ce serait donc plutôt en se fondant d'abord sur le devoir des navires neutres de ne pas aider l'ennemi et de ne pas se mettre à son service, puis sur la faculté pour le belligérant d'empêcher tous les actes des navires neutres de nature à mettre obstacle à l'exercice de son droit de guerre que les belligérants pourraient saisir les navires neutres pourvus d'appareils de télégraphie sans fil. Si les neutres ont le droit de voir respecter leurs propriétés et même leurs transactions avec les belligérants, ils ont, nous l'avons vu, le devoir corrélatif de ne pas entraver les opérations de guerre de ces derniers. Or, ils portent gravement atteinte au droit de libre belligérance des nations en lutte en s'immisçant ainsi directement dans les hostilités. (De la Notion de Contrebande de Guerre, p. 334.)

He further says:

Il nous semble que ce droit de saisie pourrait s'exercer dans deux cas:

1° Lorsque le navire neutre porteur d'appareils de télégraphie sans fil se trouve assez proche du théâtre des hostilités ou du territoire de l'un ou de l'autre belligérant pour pouvoir se servir

de ses appareils à leur profit ou à leur détriment. Le périmètre dans lequel la présence du navire sera considérée comme illicite pourra être déterminé d'après le rayon efficace maximum des belligérants, soit autour du théâtre des hostilités;

2° Lorsque ce navire neutre se dirige vers le lieu des hostilités ou vers le territoire des belligérants. (Ibid., p. 336.)

Scholz maintains that—

A neutral power is bound to watch carefully that through the wireless telegraph installations under its authority war dispatches, in so far as they are to be considered as transportation prohibited by international law, are not transmitted, if the neutral power must assume, in view of the situation of local conditions, that its installations will be used for such dispatches. Generally speaking, the duty to refuse private dispatches written in cipher does not exist. A neutral power is neither authorized nor bound by virtue of its neutrality to subject the official dispatches of another power to censorship.

When a shore or ship station for wireless telegraphy has come into hostile power, a neutral power which knows this to be the case and undertakes to correspond with such station is bound to regulate any censorship going beyond the provisions of the foregoing paragraph in such manner as to have private telegrams in cipher refused. It is further bound to urge any private company in interest which may be established within the territory under its sovereignty to adopt such censorship. (Drahtlose Telegraphie und Neutralität, p. 9.)

In the Naval War College lectures in 1901, after citing some of the bases for interruption of cable service, it is stated that—

Another element in the cable operation is such as to make it possible to bring the act, under certain circumstances, within the limits of what is now termed unneutral service, which includes the knowing carriage or repetition of messages of the enemy by a neutral. If this principle is to be generally recognized, and it doubtless must be if wireless telegraphy becomes widely practicable, then the transmission of messages by cable is one of the means by which unneutral service may be most easily rendered, and provision must be made to check it. The neutral landing place of the cable would be the seat of an act of the nature of an unneutral service as truly as a vessel which, on the high seas, repeats a message of a belligerent at one point to his fellow-belligerent at another point, more or less distant, with a view to aiding him, either for pay or for reasons of friendship. While the neutral landing place of the cable can not be seized any more than can the neutral ship if it be within the neutral jurisdiction, the act in either case can be a subject of protest, and if

continued may be a basis for damages. If the cable be one connecting with the belligerent territory it may, outside of the neutral jurisdiction, be interrupted. Of course a cable between two neutral points can not perform such service, and is therefore not liable to interruption. (Wilson, Submarine Telegraphic Cables in their International Relations, p. 23.)

Rolland discusses certain points in regard to the use of wireless telegraphy.

He says:

Dans l'hypothèse d'une guerre maritime, ces solutions restent vraies mais elles ont besoin d'être complétées. Il convient en effet, ici encore, de donner à chaque belligérant les moyens d'assurer le respect de ses défenses. Il doit, par suite, d'abord lui être possible de visiter les navires neutres de manière à s'assurer qu'ils ne servent pas à correspondre par télégraphie sans fil. Mais faut-il aller plus loin? Lorsqu'il s'agit du transport de correspondances postales, on admet généralement que, si le belligérant trouve sur un navire de commerce neutre des dépêches prohibées, il a le droit de confisquer et les dépêches et le navire. Il n'y a d'exception que pour les paquebots postaux placés dans une situation particulière à cause qu'ils participent à un service public international. Pareillement, lorsqu'il s'agit des dépêches télégraphiques transmises par câble sous-marin, on reconnaît assez généralement au belligerant, sur le territoire duquel le câble vient aboutir, le droit de restreindre ou de couper la communication. On lui permet même de rompre les cables aboutissant chez son adversaire au cas de blocus ou de contrebande de guerre.

Il convient, nous semble-t-il, de poser en notre matière des règles assez voisines. Le navire neutre visité a-t-il enfreint la défense de correspondre par télégraphie sans fil, le belligérant peut d'abord lui interdire de rester dans sa zone d'opérations. Nous pensons même qu'il est en droit de confisquer, tout au moins de mettre sous séquestre, les appareils de télégraphie dont est muni le navire. Par là, il donne une sanction efficace à sa prohibition en même temps qu'il en assure le respect dans l'avenir. Les navires neutres n'ont au surplus rien à dire s'ils ont été avertis de l'interdiction de communiquer. Ceci s'applique, bien entendu, lorsque les dépêches transmises étaient innocentes. Il va de soi que s'il est démontré que les mouvelles transmises par télégraphie sans fil par ce navire neutre étaient destinées à fournir à l'autre belligérant des renseignements relatifs à la conduite des hostilités, on peut aller plus loin. Dans ce cas, le navire neutre s'est mis en quelque sorte au service d'un belligérant. L'autre a le droit de confisquer et le double des dépêches et les appareils et le navire lui-même. Ici encore, cependant, il faut faire une exception pour les paquebots postaux. De ceux-ci,

la participation à un service international a une telle importance qu'elle ne doit point être ralentie. Le belligérant ne peut donc que saisir le double des dépêches et écarter le navire de sa zone d'opérations. (La télégraphie sans fil et le droit des gens. (13 Revue Générale de Droit International Public, 1906, p. 86.)

Rolland also says in case of a station in a neutral state, but not belonging to it, from which wireless messages are sent:

En principe, l'État neutre doit présumer que les émissions d'ondes faites soit d'un hôtel d'ambassade, soit d'un navire ancré dans un de ses ports, n'ont pour but que de transmettre des dépêches privées ou les correspondances adressées par l'ambassadeur d'un belligérant à son gouvernement. Toutes ces dépêches sont innocentes, il faut donc les laisser passer. Le principe est hors de doute, mais il ne faut pas oublier non plus que l'État neutre est obligé de s'abstenir de toute immixtion dans les hostilités. Surtout il convient de rappeler qu'il ne doit pas souffrir qu'un belligérant se serve de son territoire comme point d'appui pour ses opérations militaires. À supposer donc qu'il soit démontré qu'un navire neutre ou belligérant, stationné dans les eaux territoriales, communique par télégraphie sans fil des renseignements relatifs à la conduite des hostilités à un belligérant, que l'installation faite d'un appareil de télégraphie sans fil sur un hôtel d'ambassade n'a manifestement d'autre objet que de permettre à une place assiégée de communiquer avec le dehors, l'État neutre se trouvera tenu d'interdire de telles émissions.

Que l'on n'exagère pas d'ailleurs la portée de cette dernière conclusion. Elle n'est évidemment admissible que s'il est manifesté que l'installation télégraphique et l'émission d'ondes ont pour objet une véritable participation aux opérations militaires. La chose n'apparaîtra pas, en fait, très souvent clairement. Si dès lors il y a la moindre hésitation soit sur la nature des télégrammes, soit sur leur destination, on doit les présumer pacifiques et l'on ne peut plus faire au neutre une obligation de les interdire. Par ailleurs, l'État neutre n'est obligé de formuler une interdiction que si l'émission d'ondes implique réellement l'utilisation de son territoire comme point d'appui. Il en est ainsi quand la communication émane d'un hôtel d'ambassade, d'un navire à l'ancre dans un de ses ports ou stationné dans sa mer territoriale, d'un ballon captif neutre partant d'un point de son territoire. (13 Revue Générale de Droit International Public, p. 89.)

The general matter of transmission messages is stated as follows:

No overt act could be performed by a neutral in aid of a belligerent more clearly unlawful than the transmission of signals or the carrying of messages between two portions of a fleet engaged in concert in hostile operations, and not in sight of each other. It

makes no difference whether such fleets or squadrons are in ports of their own country, in neutral ports, or on the high seas, or whether such signals are transmitted by the neutral directly or through a repeating neutral vessel. No matter whether such communications be verbal or written, important or unimportant to the general results of the war, as the criminality of the act depends alone upon the nature of the service in which the neutral is engaged. The same principle extends to signaling or bearing of messages between a land force and a fleet, or to the laying of a cable to be used chiefly or exclusively for hostile purposes. (Taylor, International Public Law, p. 754, sec. 670.)

In regard to wireless telegraphy it has been said:

Wireless telegraph communications are to be treated like cables. The belligerents must have the right to interrupt these communications between portions of the opponent's territory, or between points of a hostile and a neutral country, by seizing floating stations—including those belonging to neutrals, which must be returned subsequently—or by establishing intercepting stations. (Commander von Uslar, 181 North American Review, 187.)

Scholz, speaking of the penalty for transmission of wireless messages, says:

Finally, the contraband and blockade law, with its positively formulated legal consequences, can not be applied analogously to cases where it is less a question of commercial traffic than of direct interference with the interests of the belligerents. When such unneutral interference has taken place, the neutrality has been forfeited. It is obvious, therefore, that the ship can not acquire immunity from punishment upon reaching the nearest port, still less upon the transmission of the news; otherwise the doors would be opened wide to violations of neutrality.

On the other hand, unlimited liability to punishment in time of war is not in harmony with the principles of international maritime law. Such unlimited liability would be justified only in cases where intention of aid to belligerents can be plainly established from the ship's behavior. In such cases she acquires the character of a hostile ship, intended for warlike actions. But where such intention does not exist, and these are the only cases to be considered in this connection, the liability of the ship must be more accurately defined under the international maritime law in its present shape. The most expedient solution appears to me to be that according to which the capture of a ship is permissible only within the "zone of hostilities," but there during the entire duration of the war. If a ship could acquire immunity from punishment by leaving this zone, so that she could not be pursued upon reentering it, it would compel the belligerents to extend the zone beyond reasonable bounds. It is true that a

neutral ship which has her home port in the vicinity of this zone—which, of course, can not embrace neutral territorial waters—may be in danger of capture during the whole period of the war. But it should be remembered that a ship which, notwithstanding the prohibition issued, lends herself to the unneutral dissemination of war news is not entitled to the same leniency as a ship engaged in the pursuit of her commercial interests which violates the contraband or blockade law. The unneutral dissemination of war news is much more closely related to the case of "prendre part aux hostilités" than to that of prohibited transportation.

If the solution suggested is not adopted it seems to me that the only other solution could be to consider the arrival at the home port as the point to terminate liability, for it would not be just to the interests of the belligerents if the right of repression were to cease when the ship reaches the nearest (home or neutral) waters. But, under this view, which would again permit "saisie au retour," such a ship might become liable to warlike acts even in distant oceans. Limitation to the "zone of hostilities" recognizes the idea of the localization of war measures and forms perhaps the most expedient compromise of conflicting interests.

According to the foregoing, the following principles might be laid down:

A belligerent has the right to prohibit, within the zone of hostilities to be defined by him and publicly announced, the dissemination of information as to the whereabouts and movements of his war and merchant vessels, and other warlike measures, by means of wireless telegraphy on board of neutral vessels. Violations whereby facts requiring secrecy are divulged with the knowledge or as the result of the negligence of the captain of the ship entail capture and condemnation of the ship, independently of the fact whether the ship intended to render aid to the hostile party. Capture is permissible only within the zone of hostilities, but there during the entire period of the war.

If the transmission by wireless telegraphy is combined with acquisition of the information under aggravating circumstances of espionage, the guilty parties are subject to the punishment provided for this offense. (Drahtlose Telegraphie und Neutralität, p. 43.)

There can hardly be any doubt as to the correctness of the theory that a neutral power cannot permit its telegraph offices to be used for the purpose of working harm to a belligerent. It is true that a neutral power is not bound, generally speaking, to prevent the exportation of contraband of war by private individuals, although in the most important cases, according to the Three Rules of Washington, the contrary is universal law. In any event a neutral power is bound to watch carefully that it does

not itself become a carrier of contraband. It cannot use considerations of operation, still less of privacy of telegrams, as a pretext for permitting the transmission of official telegraphic war dispatches, any more than it could allege, in case of carrying contraband on its national ships, that it did not have to concern itself with the destination of the articles in question. If such were not the case, a belligerent could use neutral telegraph installations without restriction for its war dispatches, so that what is strictly prohibited by the medium of mail on the sea would be permitted by telegraph. Hence a certain censorship follows from the duty of neutrality. (Ibid., p. 7.)

While the privilege of free and uncontrolled telegraphic communication with their home country, even in time of war, is generally accorded diplomats and consuls, this privilege is based entirely on the *supposition* that the information exchanged between a belligerent power and its representative residing in a neutral country relates to the affairs of the neutral country, hence, that the subject of it is neutral and does not affect the conduct of the war. That is not the case where the object is to provide for an invested fortress communication with the outside world, in particular with a representative of the home government. In the latter case it is not a furtherance of neutral interests, but constitutes aid to a belligerent. (Ibid, p. 15.)

The neutral state is also under some obligation.

When a floating telegraph station is in the service of a neutral telegraph company and conveys to such company important news bearing on the war or news obtained by way of espionage, and the company disseminates such news, the neutral state, upon learning of the case, would be bound to interfere. But what the state is bound to prohibit is not the unneutral manner of obtaining news outside of its sovereign territory, but the transmission and dissemination of such news, injurious to the belligerents, within the territory under its sovereignty. (Scholz, Drahtlose Telegraphie und Neutralität, p. 12.)

Professor Hershey, in a recent book, concludes:

But in view of the possible injury which may result to belligerents from the use of wireless telegraphy on the high seas or on neutral territory, some concessions should perhaps be made to military necessity, provided neutral rights and interests are not seriously impaired. Interference with wireless messages by neutrals on the high seas might, under certain circumstances, be permitted by belligerents, as also the seizure and confiscation of wireless telegraphy apparatus as contraband of war, and neutrals should certainly refuse to permit the use of their territory for military purposes. (International Law and Diplomacy of the Russo-Japanese War, p. 123.)

Despagnet says:

Mais il semble difficile de ne pas reconnaître aux belligérants, sauf dans les eaux territoriales neutres, le droit de contrôler ou même d'interdire toute communication par la télégraphie sans fil, soit avec l'ennemi, soit avec le territoire qu'ils occupent ou avec leurs navires, puisqu'ils ont le droit de censurer les dépêches venant du théâtre des hostilités ou même d'éloigner tout bâtiment neutre qui gêne leur action militaire. Par analogie avec ce que l'on admet pour les câbles sous-marins que le belligérant peut couper même entre un pays neutre, d'une part, et l'ennemi ou lui-même, de l'autre, on doit reconnaître qu'il peut interdire l'usage de la télégraphie sans fil dans tout le rayon où elle peut être efficace pour saisir des informations venant soit des armées soit du pays adversaire. (Droit International Public, 3d ed., p. 848.)

Speaking of the right to restrict the use of wireless telegraph, Kebedgy says:

Le belligérant pourra exercer ce droit sur le théâtre de la guerre; cela comprend, dans la guerre maritime, la mer littorale des belligérants et la pleine mer; cela exclut donc la mer littorale des neutres, ainsi que les parties de la mer conventionnellement neutralisées.

Ceci étant, les mesures que le belligérant peut prendre pour se préserver des inconvénients possibles à son égard de l'emploi de la télégraphie sans fil sont de deux sortes: il peut ou bien l'interdire complètement, ou bien la soumettre à certaines restrictions. (La Télégraphie sans Fil et la Guerre, 6 Revue de Droit International, p. 447.)

There is much difficulty in determining the extent of the area of hostile operations in a manner satisfactory to belligerents and to neutrals. With the increasing range of guns this area has correspondingly enlarged. The speed and endurance of vessels of war has also influenced the extent of effective control. Effective scouting has with the system of wireless telegraphy become much extended. A wireless apparatus may be of great service even though far removed from the immediate area of hostilities. The location of the apparatus is not determinable as are the generally fixed termini of the wire systems. The point at which the wireless equipment may be is not always the important element in the transmission of the message. The nature of the service rendered seems to be the main question. The service may be of as much or possibly of more advantage to a belligerent

if the apparatus is several hundred miles distant rather than near the scene of hostilities, e. g., it may be of greatest importance for a belligerent whose forces are somewhat separated to know a considerable time in advance of the approach of the enemy, in order that the separated forces may be concentrated. To fix an area outside of which wireless service, whatever its character, is free does not seem feasible in actual practice.

It is evident that persons who engage in the transmission of wireless messages cannot properly be regarded and treated as spies. (See Situation VII, International Law Situations, Naval War College, 1904.)

It is also evident from the Chifu incident and from the tendency of opinion that a neutral is responsible to a reasonable extent for the establishment on its territory of stations for the operation of wireless telegraphy. The state can accordingly exercise such control over these stations as may seem expedient.

Regulations of Institute of International Law.—At the session of the Institute of International Law in September, 1906, the following regulations in regard to wireless telegraphy were adopted:

DISPOSITIONS PRÉLIMINAIRES.

ARTICLE PREMIER. L'air est libre. Les États n'ont sur lui, en temps de paix et en temps de guerre, que les droits nécessaires à leur conservation.

ART. 2. À défaut de dispositions spéciales, les règles applicables à la correspondance télégraphique ordinaire le sont à la correspondance télégraphique sans fil.

PREMIÈRE PARTIE.

ÉTAT DE PAIX.

ART. 3. Chaque État a la faculté, dans la mesure nécessaire à sa sécurité, de s'opposer, au-dessus de son territoire et de ses eaux territoriales, et aussi haut qu'il sera utile, au passage d'ondes hertziennes, que celles-ci soient émises par un appareil d'État ou par un appareil privé placé à terre, à bord d'un navire ou d'un ballon.

ART. 4. Au cas d'interdiction de la correspondance par la télégraphie sans fil, le gouvernement devra aviser immédiatement les autres gouvernements de la défense qu'il édicte.

SECONDE PARTIE.

ÉTAT DE GUERRE.

ART. 5. Les règles admises pour le temps de paix sont, en principe, applicables au temps de guerre.

ART. 6. Sur la haute mer, dans la zone qui correspond à la sphère d'action de leurs opérations militaires, les belligérants peuvent empêcher les émissions d'ondes, même par un sujet neutre.

ART. 7. Ne sont pas considérés comme espions de guerre mais doivent être traités comme prisonniers de guerre, s'ils sont capturés, les individus qui, malgré la défense du belligérant, se livrent à la transmission ou à la réception des dépêches par télégraphie sans fil entre les diverses parties d'une armée ou d'un territoire belligérant. Il doit en être autrement si la correspondance est faite sous de faux prétextes.

Les porteurs des dépêches transmises par la télégraphie sans fil sont assimilés à des espions lorsqu'ils emploient la dissimulation ou la ruse.

Les navires et les ballons neutres qui, par leurs communications avec l'ennemi, peuvent être considérés comme s'étant mis à son service, pourront être confisqués ainsi que leurs dépêches et leurs appareils. Les sujets, navires et ballons neutres, s'il n'est pas établi que leur correspondance était destinée à fournir à l'adversaire des renseignements relatifs à la conduite des hostilités, pourront être écartés de la zone d'opérations et leurs appareils saisis et séquestrés.

ART. 8. L'État neutre n'est pas obligé de s'opposer au passage au-dessus de son territoire d'ondes hertziennes destinées à un pays en guerre.

ART. 9. L'État neutre a le droit et le devoir de fermer ou de prendre sous son administration l'établissement d'un État belligérant qu'il avait autorisé à fonctionner sur son territoire.

ART. 10. Toute interdiction de communiquer par la télégraphie sans fil, formulée par les belligérants, doit être immédiatement notifiée par eux aux gouverrnements neutres. (21 Annuaire de l'Institut, p. 327.)

Summary.—From practice, as shown in various states, from the opinions of the courts and of writers, from the votes of conferences and from international agreements, it is evident that the state within whose jurisdiction a wireless telegraph apparatus is or passes, is and will be authorized to exercise a degree of control over its use. The responsibility resting upon such state will be large.

In order to avoid possible complications in time of war it will be expedient in time of war for states, whether neutral or belligerent, to exercise control over wireless telegraphy as circumstances seem to require. There seems to be good ground for the following general principles of action:

1. All private wireless stations within the jurisdiction of a state shall exist under license and subject to regulation by that state.

2. The private stations within the jurisdiction of a state may be closed, appropriated, or placed under censorship by the government in time of war.

3. Private vessels of any nationality in time of war may be required to render inoperative their wireless apparatus when within or on entering the jurisdiction of a state, whether the state is a neutral or belligerent, and the apparatus shall thus remain while the vessel is within the state's jurisdiction unless otherwise ordered.

4. Private vessels having wireless apparatus and ignorant of the declaration of war are entitled to notification before any penalty shall be inflicted.

General conclusions.—(*a*) A belligerent may regulate or prohibit the use of wireless telegraph within the area of hostilities.

(*b*) A neutral state should use reasonable care to prevent within its jurisdiction the unneutral use of wireless telegraph.

(*c*) Unneutral use of wireless telegraph on board a vessel makes the vessel liable to the penalty of capture by a belligerent, or to confiscation or sequestration of the apparatus, or of the vessel, or of both by a neutral.

(*d*) A vessel intentionally aiding a belligerent by the use of wireless telegraph is liable to penalty until the end of the war.

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